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THE JURIST,
OR
QUARTERLY JOURNAL
OF
JURISPRUDENCE
AND
LEGISLATION.

Qui juris nodos, et legum ænigmata solvat.—*Juv.*

VOL. I.

LONDON :
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1827.

ADVERTISEMENT.

IN a country which boasts of the richness and variety of its Periodical Literature, where almost every branch of science, and every sect has its subsidiary journal, it is somewhat singular that Jurisprudence, a science in itself so interesting, and in its application so closely connected with the well-being of society, should be absolutely without any regular organ of communication with the public. Such, however, is the case with respect to England; and, what renders the circumstance more remarkable is, that, in other parts of Europe, even where periodical literature is but in its infancy, works of this class do exist. France has its "Thémis ou Bibliothèque du Jurisconsulte." In the kingdom of the Netherlands, two works of a similar description have recently appeared, one at Liege, the other at Amsterdam. In Germany, besides several minor publications relating to the laws and judicial establishments of individual states, there is the celebrated "Zeitschrift, of Savigny;" and there is also a new work, entitled "Annals of German Jurisprudence," conducted by Schunck.

It is proposed, therefore, to take up the ground hitherto unoccupied in the periodical literature of England; and many circumstances concur to render the present moment the most favourable for such an undertaking. The legislature has turned its attention to the defective state of our code, and the anomalies of our judicial system: and various measures of reform are in contemplation, which, to be efficient, must be maturely weighed, frequently discussed, and subjected to the test of a minute and searching criticism. The public mind is anxious directed to the subject, and information is sought with avidity. A spirit, also, of rational inquiry seems to pervade the practitioners of the law: there is an evident disposition amongst them to extend their views beyond the narrow technicalities of the profession, and to shake off the reproach cast upon them by a distinguished writer, "that law is studied in England rather as an art than a science."

The projected work will embrace the science of jurisprudence in its widest extent. To investigate and explain the true principles of legislation, and to apply the philosophy of law, will constitute a main feature in its plan. The history and antiquities of the law, the legal institutions of other nations and other times, will also demand its attention. The Roman law, so long depreciated in England, will not be overlooked. The decisions and practice of our courts, and the general administration of justice

throughout the empire, will meet with the consideration to which, from their vast importance, they are entitled. The acts of the legislature will be vigilantly watched, and their substance, structure, and operation examined. Above all, the proposed alterations in our code, and the reforms of our judicial institutions, will be noted in their progress, their tendencies developed, their imperfections displayed, and such suggestions offered as may serve to promote the effectual attainment of their object.

All English works of character upon the subjects above enumerated will be noticed in the "JURIST." Nor will it confine its labours to English literature alone. Out of the immense and continually increasing mass of foreign productions on law, those will be selected which possess sufficient interest, either as treating upon points which bear any affinity to the dispositions of our own legal system, or as indicative of the actual state of jurisprudence in other countries.

With regard to such English publications as are strictly of a professional nature, it would be equally beside the purpose, and beyond the limits of the work to review them all. Those alone will be noticed which are calculated to advance the science.

Each Number will contain a narrative of domestic and foreign transactions connected with the

main subject, accompanied by those incidental comments which the occasion may suggest. There will also be a space allowed for short critical notices of points which, however important in themselves, can neither require nor admit of the amplification of an essay.

Such is the general outline of the "JURIST." In its arrangement, it has not been deemed advisable to fetter its operations by any methodical classification of matter, according to the plan of some foreign journals of the same description. In the immediate selection of its subjects out of so wide a field, it must necessarily be guided, in a great degree, by a regard to the feelings and temper of the times, and the current of passing events; inasmuch as, ceasing to interest, it would cease also to be useful.

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THE JURIST.

MARCH, 1827.

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7. *An Inquiry into the Means of Consolidating and Digesting the Laws of England.* By Horace Twiss, Esq. of the Inner Temple, Barrister-at-Law. London, 1826.
8. *A Letter to Horace Twiss, Esq. M. P., being an Answer to his " Inquiry, &c."* By Crofton Uniacke, Esq. of Lincoln's Inn, Barrister-at-Law. London, 1826.

“ Il y a plus de mille ans que les femmes sont en possession de se brûler. Qui de nous osera changer une loi que le tems a consacrée ? ” So argued the eastern merchant in defence of the time-honoured ordinance which devoted widows to the flames ;—

and this is a species of logic which has always enjoyed especial favor with the advocates of the existing state of the law in England. "The watchful foresight of our ancestors,"—"the venerable fabric of our laws,"—"the accumulated wisdom of ages:" these are a few of the captivating forms of speech under which we have been taught to reverence the grand doctrine, that our legal system is of an awful and inviolable antiquity, and that to touch it would be profanation. In vain was it for years urged, that the perfection of laws consists in their being accommodated to the actual habits and wants of a nation,—to the rank which it holds in the scale of civilization,—to its political and moral state;—and that, however well adapted a code may be to the infancy of society, the time must arrive when its provisions will become either nugatory or mischievous. In vain was it represented, that at the period when Justinian undertook to re-mould the laws of Rome, they possessed all the dignity that age could confer upon them; and that the Roman Emperor, far from regarding this circumstance as constituting a claim to his forbearance, has made it his boast that he renovated laws which were bowed down with the weight of years (*leges antiquas jam senio prægravatas*). The argument of antiquity maintained its ground against common sense and even against authority; and as each succeeding year necessarily added to its cogency, it presented obstacles to improvement the more formidable, because it was a species of superstition that set all the powers of reasoning at defiance. From this slough of despond we have been at length extricated by the declaration of a Minister of the Crown, that the Criminal Law, at once the most important and defective branch of our code, requires immediate revision.

Few speeches delivered in parliament have excited a warmer interest in the public mind, or obtained a larger share of unqualified applause, than Mr. Peel's speech upon the introduction of his Larceny Bill. In substance as well as tone it was excellent. No false homage to national vanity or national prejudice; none of the vulgar topics of popular oratory; but a simple detail of the grounds of the proposed measures, with little more embellishment than what was derived from an orderly arrangement of matter, and perspicuity of language. Instead of flattering the self-esteem of the assembly to which it was addressed, it conveyed truths which, if rightly felt, must have been in the utmost degree humiliating. "Of all the subjects," said the Right Hon. Secretary, "which fall within the range of our deliberations, none perhaps has been more neglected than the Criminal Law." And it is this candid and unsparing avowal, accompanied by the acknowledgment that reparation is due to the community for past neglect, which constitutes the chief value of the speech in question. In legislation, as well

as morals, the first step towards amendment is a consciousness of former errors.

It is not our intention to investigate narrowly the causes which have operated so beneficial a change in the sentiments of the legislature. We shall abstain also from inquiring how it happens, that it should fall to Mr. Peel's lot to execute what Lord Bacon projected. Mr. Horace Twiss is of opinion that the revision of the law has "waited chiefly for a season of such tranquillity and prosperity as the present;" but, perhaps, it might be possible to discover in the history of the last two centuries a period of equal tranquillity and prosperity. The truth seems to be, that Mr. Peel has in the present instance merely yielded to the impulse of public opinion, which never was more strongly expressed upon any subject than upon the necessity of a reform in the laws. The genius of Lord Bacon outstripped the age in which he lived. He was born to instruct a nation. Mr. Peel has the inferior merit of deriving his instruction from the nation; but no sounder or more salutary principle of action in a minister can well be conceived.

Be the cause, however, what it may, we are satisfied with the assurance that a very extensive re-organization of the law is on the eve of its accomplishment. A general idea of the proposed work may be gathered from Mr. Peel's speech, although the characteristic caution of the Right Hon. gentleman has prevented him from disclosing more than was necessary for his immediate occasions. Certain preparatory labours are also partially before the public. We shall watch with solicitude, and examine with scrupulous care, every step in the progress of so important an undertaking; and even in this early stage of the proceeding, it may not be impertinent to offer a few observations upon the general bearings of the subject, and upon those publications connected with it, which have recently made their appearance.

In the prosecution of the intended reform, so much must obviously depend upon the character of the agents employed, upon their inclination as well as their means, that it is important to consider what persons may be most advantageously entrusted with the conduct of the work, so as to insure its adequate fulfilment, and to secure the nation against the illusory patchwork of expedients. The appointment of a parliamentary commission, a course sanctioned by many precedents, has been recommended on the present occasion. If the object in view were to collect a body of evidence upon a particular point, or to ascertain the feelings and sentiments of a particular class, we might, perhaps, be disposed to place some reliance on the labours either of a Select Committee in Parliament, or of a commission out of doors; although such appointments have but too often served as a mere cloak to apathy or hostility. But where the deliberation is to extend over a wide

and varied surface, where the task requires an intensity and continuity of exertion, a laborious attention to minutæ, and the nicest discrimination in separating the essential from the accidental, the principle from the abuse, a 'multitude of counsellors,' with the best possible disposition, would be calculated rather to embarrass than to facilitate the process. Committees and commissions may be useful auxiliaries; they may prepare the way for ulterior measures; but it is very rare that any work of national importance can be committed to their exclusive management with advantage. Since the year 1796, several committees have sat upon different branches of the Law of England; witnesses have been examined; masses of information collected; voluminous reports drawn up, describing in forcible language the lamentable and disgraceful imperfections of our code; but all these demonstrations, instead of leading to any comprehensive plan of amendment, have terminated in certain petty reforms, useful perchance in themselves, but supremely ridiculous, when contrasted with the solemn preparation which ushered them in. The result has too often reminded us of the words of Sir Matthew Hale:—"Only to save their credits upon such occasions they meddle with some little inconsiderable things, as they set the price upon turnips and carrot seed; but nothing is dared to be done of use and importance."

We regard it, therefore, as no inconsiderable advantage gained to the cause, that Mr. Peel has himself undertaken the task of superintending the alterations in the law. He has the benefit of the suggestions of statesmen, lawyers, and philanthropists, from the days of Bacon downwards. He has also the benefit of modern discussions on the subject, and of those valuable results which wisdom can draw from the collision of opinions. His official situation enables him to command the services of those who are best qualified to give him every requisite information, and to work out the details of the measure. It is impossible also that we should shut our eyes to the fact, that as a Minister he can effect greater good with fewer obstacles than any other person or body of men. This circumstance alone will, in a great degree, disarm cavilling opposition, and lull the terrors of the alarmists. It will give the character of prudence and discretion to propositions, which, unsanctified by the odour of office, would run the risk of being denounced as most perilous innovations.

That Mr. Peel is not a lawyer appears to us rather a matter of congratulation than regret. Without denying that there have existed, and do exist, lawyers distinguished for the enlargement of their views, and the liberality of their opinions, it is not too much to assert, that professional habits have a natural tendency to narrow the comprehension, blunt the perceptions, and give a sinister bias to the mind extremely unfavourable to the progress of

improvement. The forms and phraseology of business, modes of practice, fictions, &c. things unessential in themselves, become endeared to the lawyer by the force of education, and the charm of custom. A thousand interesting associations gather around them, and invest them with a factitious importance. The agreeable recollections of difficulties surmounted, of knowledge painfully acquired, of professional triumphs, all serve to hallow a system connected in the lawyer's apprehension with every idea of present emolument and future advancement. We question whether even Sir Samuel Romilly, notwithstanding the general accuracy of his mind, and his ready perception of the defective state of the criminal law, was fully sensible of the many gross blemishes and abuses that disfigured the proceedings of the Court in which he himself practised. "By long use and custom, men, especially that are aged, and have been long educated in the profession and practice of the law, contract a kind of superstitious veneration of it beyond what is just and reasonable. And it happens to them, as it doth to the Romanists in point of religion, in relation to ancient rites and ceremonies transmitted to them from their ancestors, that though they become overburthensome by their multitude, or ridiculous by their vanity or impertinency, or antiquated by the alteration of the ends and uses for which they were at first instituted or introduced; yet they are zealously retained, though to the apparent detriment and oppression of religion itself. And accordingly it happens to these men in point of laws." These are the words of no experimental theorist, no rash innovator, no contemner of established maxims; they are the words of Sir M. Hale himself, who, although he could conscientiously burn ancient dames for witchcraft, was not possessed of sufficient credulity to regard the laws and judicial proceedings of his own day as faultless; or of sufficient insincerity to deny that, by the obstinate prejudices of the profession to which he belonged, "forms, and proceedings, and practices, were tenaciously and rigorously maintained, which had become not only useless and impertinent, but burthensome and inconvenient, and prejudicial to the common justice and the common good of mankind."

In carrying the proposed improvements into effect, it is clear that the technical parts of the work not only may but *must of necessity* be entrusted to lawyers. But this can be attended with no danger, so long as the superintending management rests in other hands. The strong sense of Mr. Peel, unwarped by professional prepossessions, will operate as a wholesome corrective to those attachments which his subordinate agents may still cherish for the uncouth shape and garb of "old father antick, the law;" and direct the powers of legal subtlety and legal learning to the most useful and legitimate of all objects, elucidation and simplification.

With these preliminary remarks, we shall proceed to notice the publications enumerated at the head of our article. Mr. Hammond's labours, connected as they are with Mr. Peel's plan, or rather forming a part of it, are the first to demand our consideration. Mr. Hammond has been long known to the profession as the author of several practical treatises and works of reference, indicating great patience and assiduity, and an extensive range of legal reading. In 1823, he published his "*Digest and Consolidation of the Law of Forgery*," being a portion of a new Criminal Code, in the formation of which he was engaged; and to this is appended a "*Scheme of the Digest of the Laws of England*," which we shall have occasion to notice more particularly hereafter. The '*Law of Forgery*,' is introduced by a preface of no ordinary pretension;—we speak of that part of it which we have the good fortune to understand; for there is this peculiarity of style in most of Mr. Hammond's publications, that the sentences are not always intelligible. In this preface, the writer informs us that "he is now compelled distinctly to assert that, with the exception of his own, no plan for consolidating the Statute Law, or any thing approaching to one, has ever been proposed, *neither by Lord Chancellor Bacon, Sir Francis Bacon*, nor by any other person." To which he adds, that "to unfold to a greater extent that prospect which another has opened up, is a very easy task." What it was that compelled the writer to make the above bold assertion, and thus inhumanly triumph over Lord Chancellor Bacon, and Sir Francis Bacon to boot, is more than we can conjecture. There are persons, however, who may imagine that Sir Francis Bacon himself '*opened up*' (we use Mr. Hammond's expression) the grand principle of consolidation in his fourth proposition, for "the reforming and re-compiling of the Statute Law;" in which he recommended the "reducing of concurrent statutes, heaped one upon another, to one clear and uniform law." And it is not improbable that Lord Chancellor Bacon may have coincided with Sir Francis Bacon. As to the task of executing such a project, we confess that it must be laborious in the extreme, and require great nicety and precision; but there is nothing in it which a digester of the Term Reports might not with due diligence compass. We must be understood to speak here merely of consolidation;—the province of amending demands more exalted powers.

Mr. Hammond's '*Law of Forgery*' reminds us of the Frenchman's economical treatment of a leg of mutton, as described by Prior:—'*Dimanche, une eclanche;—lundi, froide et salade;—mardi, j'aime la grillade;—mercredi, hachée;—jeudi, bonne pour la capillotade*,' &c. The only difference is, that whereas the leg of mutton may be supposed to have gradually dwindled in size in

the course of its transmigrations; the 'Law of Forgery,' on the contrary, has become more bulky in each successive change. First, it appeared in a simple octavo form, published by Butterworth, with the trimmings of 'Preface,' and 'Scheme.' The next shape which it assumed was that of a Parliamentary Report. In 1824 a Select Committee of the House of Commons was appointed to consider the expediency of consolidating and amending the Criminal Law of England. The Report of the Committee is in the following words:—

"Your Committee having called before them Anthony Hammond, Esq., of the Inner Temple, he submitted to them the Papers marked Nos. 1, 2, 3, 4, which form the Appendix to this Report; and having maturely considered the same, your Committee came to the following Resolutions:

"**RESOLVED, 1.**—That it is the opinion of this Committee, that it is expedient that the Statutes relating to the Criminal Law should be consolidated under their several heads.

"**RESOLVED, 2.**—That the Chairman be directed to move for leave to bring in Bills, pursuant to the above Resolution, consolidating the Criminal Law, without any amendment or alteration.

"**RESOLVED, 3.**—That it is expedient that certain omissions and anomalies in the present state of the Criminal Law be brought under the consideration of the House, with a view to remedy the same by legislative provisions.

"**RESOLVED, 4.**—That the Chairman be directed to move for leave to bring in Bills, supplying such omissions, and remedying the existing anomalies; such amending Bills to be wholly distinct from the Consolidating Bills.

"April 2, 1824."

This is the entire body of the Report. Then comes the Appendix, consisting of Mr. Hammond's 'Law of Forgery,' which fills 360 folio pages. This work is distinguished from the former, by the circumstance that its matter is somewhat differently arranged;—that it contains all the author's learning upon the subject, in the shape of notes;—that it also contains the "Draft of a Bill to consolidate, amend, and declare the Law of Forgery;" and the process of consolidation, of which the author is marvelously proud. Prefixed to it there are certain introductory observations, displaying some of Mr. Hammond's views on the Principles of Criminal Law, which we shall examine at the same time that we examine his 'Scheme.'

The next transformation which the 'Law of Forgery' undergoes is still more imposing. In 1826 it issues from the Government Press, decorated with all the embellishments which type and paper can confer, and stamped with the seal of the 'demigod authority.' Copies are distributed to all the great public bodies and libraries; and it is in short to be considered as forming part of an important national work. To explain this we must have recourse to Mr. Hammond's 'Letter to the Members of the differ-

ent Circuits.' The 'Letter' (we should rather say the 'billet') commences in the following civil strain:—"Mr. Anthony Hammond presents his compliments to the members of the different circuits, and begs to communicate as follows:" He then announces, that "There has been printing at the government press, by Mr. Peel's directions, a series of documents styled the Criminal Code. This Code contains—1. A Digest of the Judicial Decisions; 2. A Consolidation and Condensation of the Enactments; 3. The Opinions of the Text Writers; 4. The Law of Scotland and of France; 5. Suggestions for the Amendment of each particular Title of the Criminal Law; 6. A paper ascertaining those general principles that should govern in the formation of a Code of Criminal Jurisprudence, and ascertaining by comparison in what particulars the English system, first in the abstract, and then in relation to existing institutions, is perfect or imperfect; 7. The Code itself properly so called, reducing the common or unwritten Law to writing, and bringing the Criminal Jurisprudence of this country, Common and Statute, into a single Law. The first five documents were prepared previously to the meeting of the Criminal Law Committee, and were designed as the basis of the intended reform; that department which it was proposed Mr. Hammond should fill, and which has been continued to him under the new arrangement." The last sentence is a specimen of the enigmatical felicity of Mr. Hammond's style;—what may be the *department*, which has been continued to him under the new arrangement;—whether it be the 'Basis' or the 'Reform,' is not very clear. But to proceed:—Mr. Hammond informs us that the Code is to consist of four grand divisions:—"Offences against Property;"—"Procedure;"—"Offences against the Person;"—and "Offences against the State." He adds:—"From the exertions which the King's printers have made, and from the state of the copy, it will not be long before the whole is in print. After this *I hope to be permitted with certain assistances to proceed with the Civil Law in the same way.*" (a)

(a) That Mr. Hammond's hopes are likely to be frustrated, and that he has already strangely misconceived the extent of his instructions, may be inferred from the following letter addressed to him from the Home office.

(COPY.)

"Whitehall, Jan. 9.

"Mr. Peel considers that it would be for the convenience of Mr. Hammond and himself, that Mr. Ham-

mond should distinctly understand the nature and extent of the authority which he has from Mr. Peel, to proceed in the Consolidation of a certain branch of the Statute Law of England.

"Some time after Mr. Peel had undertaken, with the assistance of Mr. Hobhouse and Mr. Gregson, to consolidate the laws relating to the trial and punishment of criminal offences, he learnt that Mr. Hammond was employed, under the direction

He then states that the particular arrangement of the code has been adopted with a view: 1st. "To suggest more readily and more distinctly to the mind eight several questions," (not one of which is, as far as we can see, suggested by the arrangement). 2d. "To render it useful to those engaged in the administration of justice, by giving a view of the whole doctrine of the law, *and by rendering any reference to the statutes, reports, or authoritative writers unnecessary, since they will all be found in this code.*" 3d. "To furnish a document, *in which the whole body of the law,*

of a Committee of the House of Commons, in preparing drafts of bills, consolidating the law relating to forgery, and some other crimes.

"Though Mr. Peel had, previously to the appointment of this Committee, undertaken a similar work, which he proposed to carry on gradually, and with that mature deliberation which is essential to its success, he was unwilling to interfere with the performance of the duty assigned by the Committee to Mr. Hammond, and was ready, so far as his intentions corresponded with those of the Committee, to stand in the same relation to Mr. Hammond in which the Committee stood.

"Mr. Peel contemplated, if time and opportunity were permitted to him, the ultimate consolidation of the whole of the Statute Law relating to crime.

"From the 1st Resolution of the Select Committee on Criminal Law, he presumes, the object of that Committee to have been the same with his own. The Resolution is to the following effect:—Resolved, That it is the opinion of this Committee, that it is expedient that the statutes relating to the Criminal Law should be consolidated under their several heads."

"Mr. Peel is perfectly willing that Mr. Hammond should proceed, under his authority, in completing what remains to be performed by him, within the limits above described.

"Mr. Peel understands these limits to be, the collection under one head of the several existing laws in the

Statute Book relating to criminal offences.

"Mr. Hammond has sent to Mr. Peel the result of his labours with respect to the laws relating to forgery, to coining, and to offences against property.

"The only material heads that remain are the laws relating to offences against the person, and the laws relating to the preservation and destruction of game.

"As to the latter, Mr. Peel has to observe, that as the subject is to be brought before Parliament in the present Session, by Lord Wharmcliffe, Mr. Hammond's labours upon it will probably be thrown away, unless they are completed before his Lordship's motion.

"Mr. Peel does not feel himself enabled to give Mr. Hammond any authority respecting the reduction of any part of the Common Law to writing, or as to the consolidation of any other portion of the Statute Law, than that which relates to crime.

"Anthony Hammond, Esq. Tanfield-court, Inner-temple."

Publicity was given to this communication, *by authority*, as it would seem, in consequence of a statement having appeared in the newspapers, copied almost verbatim from the "Letter to the Members of the different Circuits," but with this important variance, that Mr. Hammond is represented, not "*as hoping to be permitted,*" but as "*intending to proceed with the Civil Law in the same way.*"

upon any given subject, may be found, whether the information be sought by the historian, the antiquarian, or the lawyer."

As we have above remarked, we do not think that the arrangement of Mr. Hammond's code suggests any one of the eight golden questions which he has mentioned; nor do we regard the circumstance as very material, inasmuch as the considerations involved in those questions are abundantly obvious to any person who has ruminated for five minutes on the subject of Criminal Law. If this, however, be a failure, no one can deny that it is fully compensated, if the arrangement has succeeded in attaining the second and third objects in all their vast and comprehensive importance. That Mr. Hammond is satisfied that it has so succeeded, is very evident; and therefore, in full reliance upon his authority, we congratulate all those who are engaged in the administration of justice, all lawyers, historians, and antiquarians, that they may now consign their ponderous folios, their statutes, reports, and authoritative writers, "*Crok. Car., Crok. Jac., and Crok. Elia.*" to the hucksters or the flames, and upon every point of English jurisprudence refer, with perfect confidence, to Mr. Hammond's Code. (b)

But to resume;—Mr. Hammond, in the next place, proceeds to lay down a principle for our guidance, with regard to the much-agitated question of innovation, which we shall give in his own luminous language:

"There is no state of things to which objections may not be raised, and in which deficiencies may not be clearly and distinctly pointed out; but it does not, therefore, follow that we must set ourselves to reform it; because, though it be plain that, in one point of view, a benefit will result, yet, in another, the reform may produce a greater inconvenience. If it be too much to assert that it is only when the effects which a given innovation will produce can be distinctly predicated, or the worst evil that can happen can be known, that the innovation is justifiable; it is not too much to say, that where the most fatal consequences may ensue, against which we can receive no reasonable assurance, it should never be attempted. *The great political blessing which the Chancellor has been of to this country, has been his undeviating adherence to this principle.*"

A principle so novel and so sound, betokening such matchless sagacity and depth of thought, has seldom been propounded to admiring readers. The concluding compliment would doubtless be more acceptable to the learned person, who is the subject of it, if it happened to be in good grammatical English.

(b) Mr. Sugden, in his Letter to Mr. Humphreys, third edition, observing cursorily upon Mr. Hammond's Digest of the Criminal Law, says, "which, of course, he (Mr. Hammond) would not rank higher

than any other treatise on the same subject written by any other intelligent lawyer." We very much doubt whether Mr. Hammond would subscribe to this conjecture.

The only remaining part of the "Letter," which requires notice, is the announcement that two private works will ultimately grow out of the public work thus undertaken:—1. "A Digest of the Laws of England." 2. "New Commentaries on the Laws of England." Now, when the Common Law has been digested, the Statute Law consolidated, and the whole, Statute and Common, combined in a single law, according to the professed plan of Mr. Hammond's Code, the necessity of a private Digest of the Laws is not very apparent; nor is it quite obvious why Mr. Hammond should feel it incumbent upon him to write commentaries upon the code which Mr. Hammond has framed. But this is one of the conundrums to be met with in our author's writings, which we shall leave others to solve, and shall proceed to take a short review of those parts of the "Criminal Code" which have, up to this time, made their appearance. "Offences against Property" have been distributed into fifteen different titles. Five only of these have, as yet, issued from the press;—Burglary—House-breaking—Church-robbing—Coining—and the favoured offspring of Mr. Hammond's labours, Forgery. Each of these titles is divided into so many sections. "The first section is entitled the Introduction, and is chiefly historical. The remaining sections, except the last, contain the digest of judicial decisions, and the consolidation of the enactments. The consolidated enactments are first expressed in the language of the statutes themselves, and then are condensed. The last section gives a summary of the law, as contained in the preceding sections, excepting the first, and suggests certain alterations in that law." Each article is accompanied by the most complete Tables of Reference—Analytical Table of Contents—Table of Cases—Table of Books and Opinions cited—Table of Statutes, and a copious Index. It is in these more mechanical parts of the work, that Mr. Hammond appears to the greatest advantage; in which his indefatigable industry and scrupulous accuracy are most conspicuous. Remissness, indeed, can rarely be laid to the charge of our author; and those faults, which it will be our duty to point out in the body of the work, are rather attributable to a want of judgment, and a fatal defectiveness of style, than to a want of zeal.

The first section of each article is the repository of Mr. Hammond's historical and antiquarian lore. It contains etymologies, definitions, critical surmises, and the Law of France and Scotland. Thus the introduction to 'Burglary' displays in long array the many derivations of the term to be found in the text books; which derivations (with modesty be it spoken) convey about as distinct an idea of the nature and properties of that intricate title of the law, as Coke's 'parler la ment' or the 'parium lamentum' of another writer do of the constitution and powers of parliament.

Mr. Hammond, however, having maturely weighed these learned etymologies, adopts the following into his text:—"The term Burglary is compounded of the *two German words*, Burgh a house and Laron a thief;"—the only objection to which is, that, as the word Burgh is decidedly German, the word Laron is decidedly *not* German. We shrewdly suspect, that Sir Edward East is the innocent cause of the blunder, in having stated that "burglary is derived from the German burg, a house, and laron or latro a thief." This shows the danger of altering or inverting the expressions of an author in copying him, and will probably remind our readers of Ash's ludicrous endeavour to render Johnson's exposition of the word curmudgeon more explicit, by translating 'cœur' old, and 'mechant,' correspondent. As to definitions, the introduction to Forgery contains no less than eight from different great authorities; and these not being sufficient, Mr. Hammond has favoured us with one of his own. Forgery at common law, he says, may be defined 'Fraudulently investing any writing with a fictitious character.' This is, no doubt, more sonorous and dignified, but it may be questioned whether it is more clear than Blackstone's definition:—"The fraudulent making or alteration of a writing, to the prejudice of another's right;" or than Hawkins's, *as quoted by Mr. Hammond*, viz. "Falsely or fraudulently making or altering."—We say, *as quoted by Mr. Hammond*, because our author, by curtailing the sentence, has suppressed the fact, that Hawkins limits the crime at common law to the falsification of "any matter of record, or any other authentic matter of a public nature;" a limitation, to which all those, who wish to preserve a distinct and definite idea of the meaning of that much-abused term 'Common Law,' will be inclined to accede.

With respect to the French law introduced into the work before us, our readers must not imagine that the dispositions of the 'Code Napoleon' are analysed or explained, its simplicity compared with the complex sinuosities of our own system, or any hints drawn from it to guide and assist us in the task of amelioration. Instead of this, a certain portion of the 'Code Penal' is given, once for all, in a note, without gloss, comment, translation or exposition. And thus is satisfied our author's engagement as to the Law of France. There are persons who may be of opinion, that as the avowed object of the Code before us is to exhibit the Law of England in its actual state, in order to ascertain what modifications or alterations may be advisable, it was altogether unnecessary to insert the provisions of the French Code; and that it would have been quite as reasonable to introduce extracts from the 'Peinliche Gerichts-ordnung' of Charles the Fifth, the Code Frederique, or the Code of Louisiana. But be that as it may, we are convinced that the passages inserted are, in their present shape, absolutely

useless for any practical purpose, however they may serve as embellishments.

Of the Scotch law contained in the several articles under consideration, we have only to observe that, judging from the extent of the extracts already made from Hume's Commentaries, we have every reason to believe, that by the time Mr. Hammond's Criminal Code is completed, Hume's two quarto volumes will become entirely superfluous, inasmuch as every word of them will have been incorporated in the new work. The truth is, that Mr. Hammond uses no discretion in his quotations. Whether it be for the purpose of proof or illustration; whether he is dealing with reported cases or the opinions of text authors, he perseveringly drains his authorities to the dregs, citing on through matter relevant and irrelevant with indiscriminating prolixity; so that each title is swelled out to a bulk absolutely appalling to those wearied spirits, which after wandering in the wilderness of Statutes and Precedents, of Digests, Abridgements, Reports, Practical Treatises, Summaries, and Indexes, have been accustomed to look forward to a new Code, as the Land of Promise, a place of rest.

We shall not dwell upon the affectation of calling the paragraphs "*placita*," (c) although any approach to foppery might well have been spared in a work of so grave a cast; but shall hasten to consider the consolidating and condensing sections. In these operations the author has been, upon the whole, tolerably successful. The principal fault that can be laid to his charge is ambiguity; a fault it must be confessed of no trivial importance in such a work, but which we are satisfied is to be ascribed not to ignorance of his subject, but to the defective construction of his language, and the involution of his periods. A few examples will suffice to exhibit Mr. Hammond's powers of perplexing. In the title "Burglary," pl. 115, 116, he states the law in these words: "As to what shall be a breaking, a breaking is either in law or in fact. In fact, where some portion of the fabric is displaced.

(c) The author has evidently a strong predilection for the Latin language; but by some strange fatality it generally suffers distortion or mutilation under his pen. In title "Housebreaking," p. 98. he quotes a passage from Barrington thus: "the money was chiefly in the coffers of the barons, centum *servata claribus*." For the credit of Barrington we beg to state that he has it *servata clavibus*. We recollect also to have met with the following curious verbal associations in a certain

treatise on the law of Nisi Prius by Mr. Hammond:—"vis impressus," and "contra regem et *legibus*." With respect to the latter, we are aware that the learned Kysarcus maintains that where "the fault is only in the declension, and the roots of the word continue untouched, the inflections of their branches, either this way or that will not destroy the force of Latin in baptism." Perhaps it may be with law as with baptism; but even this will not mend *claribus*.

In law, where an ideal boundary is transgressed. And the rule is settled to be that a breaking in fact is alone sufficient." It would scarcely require the opinion of the twelve judges to establish the rule, that a *breaking in fact would be alone sufficient* to constitute a breaking. The author's meaning no doubt is, that an actual, not a constructive, breaking is necessary to the crime of burglary. Again, he proposes to condense 12 Ann. c. 7. s. 3. in the following form:—"It shall be burglary feloniously to enter a house by day or night, without breaking it, or being in a house to commit a felony, and in the night time to break the house to get out of it." pl. 90—from which it would appear to any person unacquainted with the law, that it is burglary, "*feloniously to enter a house by day or night without breaking it*;" for that clause of the sentence is complete. The act of Anne is in itself not exactly a model of composition; but our author's condensation would render it nonsense. Again, in the title "Coining," one of the provisions of 3 G. 4, c. 114, is thus stated:—"And that in addition to, or in lieu of any other punishment, the offence of uttering counterfeit King's money of gold or silver is punishable with *hard labour for not exceeding the term of the imprisonment.*" The natural inference from this passage is, that there are cases in which the punishment of hard labour is inflicted *without imprisonment*. No such inference can be drawn from the words of the statute itself, which are unusually explicit, viz. that for certain offences the Court shall have the power to award "sentence of imprisonment with hard labour, for any term not exceeding the term for which such Court may now imprison for such offences."

The concluding section of each title professes, as we have above seen, to give a summary of the law upon the particular subject, and to "suggest certain alterations in that law." The summary is accordingly furnished, but the column for "proposed alterations" remains almost a blank. This circumstance is the more to be regretted, because the few alterations that are suggested display much of that "originality," which Mr. Hammond declares, in his 'Letter,' to be one of the characteristics of his work; and prove most satisfactorily that he is accustomed "*to think for himself.*" For example, in p. 136 of title "Burglary," his suggestion is this:—"Provide that an entry without a breaking, or a breaking without an entry, shall be sufficient in burglary." Without pausing to inquire whether this alteration would be judicious, let us pass to the next suggestion, standing in the very same page, without a single intervening sentence to interrupt the current of the author's ideas; "Provide that the transgression of an ideal boundary shall be—a breaking!!" Now it does not appear how the phrase "transgression of an ideal

boundary" is at all applicable to burglary; for, although a man's land may have an ideal invisible boundary, existing only in the contemplation of law, so as to support the "*clausum fregit*" of trespass, his dwelling-house, *domus mansionalis*, has usually something more than an ideal boundary, except, indeed, when he happens to lodge under that "excellent canopy, the air." However, if the transgression of an ideal boundary means any thing, it means *an entry*. Therefore, let us see how the two suggestions stand; 1. That an entry without a breaking shall be burglary, and that a breaking without an entry shall be burglary. 2. That an entry (transgression of an ideal boundary) shall be a breaking; the natural corollary to which is, that a breaking *without a breaking* shall be burglary.

In considering Mr. Hammond's proposed alterations, we are insensibly led to inquire how far he is qualified for the important task of purging the law of its defects. Some of the most revolting imperfections of our Criminal Code, and of the practice of our Criminal Courts, originate in the vague and indeterminate, if not erroneous notions, which legislators, as well as judges, have entertained with respect to the fundamental principles of Penal Law. And we may safely assert that, without a correct apprehension, and steady application of those principles, any measures of reform will be maimed, and incomplete in themselves, and unsatisfactory to the feelings and wishes of the nation. Mr. Hammond has promised us a "paper ascertaining those general principles that should govern in the formation of a Code of Criminal Jurisprudence." This paper has not yet appeared; but, in its absence, we are fortunately enabled to form some estimate of our author's progress in the science of jurisprudence from two tracts, to which we have already alluded; namely, the "Scheme of a Digest" subjoined to the "Law of Forgery" in its original shape, and the "Introductory Observations," which are a part of the Appendix to the Parliamentary Report of April, 1824.

The "Scheme" opens after the manner of Scarron or Fielding. Our readers will probably recollect the following pithy titles to some of Fielding's chapters:—"Shewing what kind of a history this is; what it is like, and what it is not like;"—"Containing little or nothing;" &c. In the same happy communicative strain does the "Scheme" commence:—"Section 1, Shewing that the work has been separated into three parts." This section contains little that is original, except the proposition that "it is only by taking from what is imperfect that we form the idea of perfection!" The second section presents us with the specimen of a chapter on summary convictions, not unworthy of note, as it is evidently the offspring of mature reflection, and

may be expected to appear again before the public, in some one of the numerous publications promised by the author (*d*): "A conviction is the judicial act of a competent jurisdiction, recording a summary proceeding, by which an offender is convicted of a crime denounced, and sentenced to a punishment enjoined by act of Parliament." It might perhaps have been as clear an exposition of the subject, to have said, "A summary conviction is—a summary conviction;"—a proposition which we are by no means prepared to controvert. There is another proposition of the author upon the same subject in the same page, which is equally indisputable:—"The Act warranting the proceeding either prescribes the form which the conviction shall assume, or, it does not. And prescribing a form, either enjoins its observance, or—(mark the conscientious circumspection of the author) contains no such injunction."

"O Laertiade, quicquid dicam, aut erit, aut non."

These, however, are transient beauties. What we would wish especially to recommend to the attention of our readers, is the sixth section of the "Scheme," containing part of an "Essay on the Theory of Criminal Jurisprudence, and Executive Justice." Our space will not allow us to display in detail the many ingenious doctrines broached in the Essay in question, nor the arguments upon which those doctrines are founded. We must content ourselves with exhibiting a few of the results at which the author arrives, referring our readers to the Essay itself, which will amply repay the labour of perusal, and may furnish curious subjects of speculation to those who employ themselves in tracing the workings of the human mind. The following conclusions, it must be confessed, are those of no ordinary genius:—That sympathy with the misery of others was the first parent of penal jurisprudence.—P. 27. That the punishment of death is efficacious in deterring from crime; and that all other punishments are inefficacious.—P. 47.

(To which we can add no more appropriate comment than the words of King Arthur, in Tom Thumb—"Hang all the culprits.")

That the frequency of capital punishment does *not* tend to harden and deprave the public feelings.—P. 47. That the infliction of death for offences differing in degrees of malignity does *not* tend to confound the ideas of guilt. Pp. 50–2. That where the punishment for murder is the same as that which is inflicted for a minor offence, an offender is *not* tempted to commit murder, in order to destroy the evidence of guilt; *because no instance*

(*d*) The same specimen is also inserted in the 'Introductory Observations,' which leaves no doubt of the value attached to it by the author

has been known in England of a forger adding murder to fraud. (e)

From the "Scheme," we turn to the "Introductory Observations," which have this additional claim to our notice, that they come sanctioned by the wisdom and grave authority of a Select Committee of the House of Commons.

In these "Observations," the author communicates a discovery as notable and ingenious as any of the doctrines advanced in his "Scheme;" namely, that the distinction between larceny and fraud is a distinction, "raised on the sands of technicality and form, and wanting that foundation in reason which alone can promise an eternal stability." Amidst the infinite variety of human actions, which are the subjects of Penal Law, it must be admitted, that it is often difficult for the legislator, or the jurist, in the classification of offences, (f) to establish such precise rules and limitations as will stand the test of an accurate and critical judgment. The difficulty, however, occurs only in the subdivision of crimes. There still remain certain broad lines of demarcation, which strike the most casual observer, and are unhesitatingly recognized by the common reason of mankind. Of this number, we confess, we have been accustomed to regard the distinction between theft, or robbery, and fraud. But, says Mr. Hammond, the motive is the same in fraud as in larceny; "Since what is it more than the intention to appropriate another man's property? The end in view is the same in fraud as in larceny; since what is it more than to accomplish the motive just described?" To which we beg leave to add, that the motive is the same in seduction as in rape, and so is the end; that where a man, as in the case put, 1 Hale, 429, "either by working upon the fancy of another, or possibly by harsh or unkind usage, puts another into such passion of grief or fear, that the party either dies suddenly, or contracts some disease whereof he dies;" the motive may be the same as in homicide, and so is the end. But are the means employed wholly immaterial? Is there no difference, except in degree, between the act of a man, who, by deceitful re-

(e) The forger would be somewhat embarrassed in the selection of his victim. Should he murder the banker, the banker's clerk, or the man whose cheque he has forged? Or should he cut them all off at one fell swoop? Men have been known to carry on an extensive system of forgery for years; and if they murdered even one individual for every fraud, the earth would be thinned.

(f) Mr. Hammond has a curious notion respecting the classification of crimes. He says, in his 'Observations,' p. 8, "The chief reason for classifying crime, thereby discriminating criminal actions as offences of different natures, is to punish certain actions with greater severity." Was this the chief reason for distinguishing murder from forgery?

presentations, induces you to give him money, and that of him who knocks you down on the highway, and robs you of your purse? Mr. Hammond does not express so much: but having satisfied his mind, by what process we do not learn, that "the mischief arising from the means employed is, *in degrees at least*, as great in fraud as in *simple larceny*," he arrives at the impotent conclusion, that, *therefore*, there is no reason for classing fraud and larceny generally as crimes of different natures. And then he recommends us, in a note, "to make a common form of indictment serve as well for fraud as for larceny, and leave it to the jury to find (*as under the French system*) a discriminating verdict." Where he has gleaned this piece of information, as to the practice under the French system, we know not. It is not impossible that he may have been led into error by the word "frauduleusement" in the definition of the crime "Vol." *Code Pénal*, Art. 379.

"Quiconque a soustrait *frauduleusement* une chose qui ne lui appartient pas, est coupable de vol."

But a reference to the "Rapport par M. Louvet," would have instructed him as to the legal acceptation of that word:—

"Jusqu'ici le mot *frauduleusement* n'avait pas été compris dans la définition, et on avait été obligé de recourir à un article secondaire, pour expliquer que la soustraction de la chose d'autrui, faite par celui qui s'en croyait propriétaire, n'était pas un vol. Le mot *frauduleusement* ajouté à la nouvelle définition, rend inutile cette disposition auxiliaire, qui compliquoit l'ancienne, et qui a quelquefois causé de l'embarras dans la marche des jugements." *Code Pénal. Motifs et Rapports*, t. 2. p. 274.

The "Code Pénal" certainly classes under the head of "Vol" many acts, which our law, in the true spirit of scholastic subtlety, denominates frauds. But so far is it from confounding the distinction between theft and fraud, that it has a separate title for the latter; (Banqueroutes, Escroqueries, et autres espèces de fraude; Liv. 3. t. 2. s. 2.) and we have no authority but that of Mr. Hammond for supposing, that when the president has proposed to the jury the question:—"L'accusé est il coupable d'avoir commis *tel vol*, avec toutes les circonstances &c." the jury is empowered to answer:—"L'accusé est coupable d'avoir commis *une escroquerie*."

One word more upon the "Observations," that our readers may learn to thank the genius of our government for another additional blessing to the many that have been so justly ascribed to it. "Much has been said," observes Mr. Hammond, "against the verbiage of our statute law; and comparisons to its disadvantage have been drawn between itself and the written laws of other kingdoms. *This censure, however, seems for the most part to be*

very unmerited, in that much of the verbiage of our statute law results from the genius of our government." We would fain believe that this is a piece of 'candied courtesy,'

"Melle soporata et medicatis frugibus offa,"

which the author presents to the Select Committee in return for its complaisance, in admitting his other crudities. We have, indeed, seen a mother enamoured of the deformities of her offspring. We know that there have been commentators upon Shakspeare, who in the fervour of their homage have found matter of admiration in his very anachronisms and geographical blunders. We know that the legal jargon, called law French, had many warm eulogists; and was declared by Sir John Davis to be "so apt, so natural, and so proper, for the matter and subject of his reports, as no other language would be significant enough to express the same." So that we are not absolutely unused to paradoxical and startling notions. And yet we must confess, that we were unprepared to find, even in Mr. Hammond, an apologist for the verbiage of the statutes, or to hear that verbiage attributed to the "genius of our government."

We pass from Mr. Hammond's voluminous labours to the pamphlets of Mr. Uniacke and Mr. Twiss. The "Letter to the Lord Chancellor" is indited in passion,—somewhat "in King Cambyases' vein;"—it is not, however, entirely devoid of interest. Scattered here and there, we meet with some judicious remarks, although it is not always easy to disengage them from the load of their cumbrous ornaments. There are also some ingenious experiments and illustrations, which are instructive as well as entertaining. The writer has taken a portion of Magna Charta, and dissolved it in the 'aqua distillata' of modern legislative phraseology, with most ludicrous effect. On the other hand, he has taken the Bankrupt Act, and translated it into ordinary language, changing the original style altogether, except, as he informs us, "*where a total ignorance of the sense obliged him to borrow the words of the act.*" The new arrangement of the act is conducted upon the plan of Domat's Civil Law;—a plan which Mr. Uniacke recommends for general adoption in the consolidation of our laws. We have no objection to the plan in the abstract. On the contrary, we think it possesses many claims upon the favourable consideration of the public; of which, the circumstance that it unites brevity with perspicuity is not the least important. But we are not sanguine enough to imagine, that so fundamental a change in the scheme and structure of our jurisprudence would be received with universal approbation; or that it would be productive of all the advantages contemplated by Mr. Uniacke. Violent changes are cautiously to be avoided in legislation as well as poli-

tics; and we are fortunately not reduced to the distressing dilemma of either abandoning all hopes of an adequate reformation of the laws, or of adopting a plan calculated to shock and confound all the received notions of those who are to carry the law into effect.

Mr. Uniacke has furnished us with an instructive epitome of the legislative operations of a session of parliament, by collecting the titles of sixty acts (out of 115) that passed in the session of 1824, all purporting to *amend, alter, explain, or render more effectual*, former acts;—and these, no doubt, in the fullness of time, will require sixty other subsidiary laws, to amend, alter, explain, or render them more effectual.

As we are anxious to decorate our first Number with, at least, one piece of fine writing, we give the following superlative passage from the “Letter to the Lord Chancellor,” even at the risk of thereby betraying the jejune insipidity of our own style, and incurring the fate of Dr. Homenas, in his Sermon-notes.

“Is there a man in the kingdom in the slightest degree acquainted with the method of science, or the ordinary perspicuity of language, *who will not rise up and declare*, that the style of the statute law of the realm is almost unintelligible, and ought instantly to be abolished as unworthy of the present enlightened age? We have the order and arrangement of science adapted *to the flowers of the fields, to the minerals of the earth, to the birds of the air, and to the fishes of the sea.* The insect and the reptile, the constellations of the heavens, and the great phenomena of nature, have all in their turns been obliged to yield to the systems and classification of human invention: but the laws which are to govern *the first empire in the history of the world* are in darkness and disorder, without arrangement or method—confusedly conceived—obscurely expressed—altered without regard to consistency, force, or meaning, and now almost beyond the comprehension of man, by whose wearied and distracted intellect they have been contrived, and for whose government they are designed. Even the sage is lost in the labyrinth through which the man of *common sense* is expected and bound to pass; and when he is bewildered in all its windings and perplexities, is proudly told, that he is sheltered by the blessed asylum which protects his property, his liberty, and his life. *Shall man, whose lofty and commanding genius has searched the mysteries of nature, and called into useful action the principles concealed from ordinary observation,* be any longer regardless of the simple principles on which the science of jurisprudence depends—or irresolute in the great enterprise of once more restoring them to the light, which has almost ceased to shed a beam upon the shapeless and oppressive mass?” Pp. 8, 9.

So justly proud is the author of the sublime eloquence of the above passage, that he has copied it, word for word, into his “Letter to Mr. Twiss,” p. 56. This second Letter is an answer to Mr. Twiss’s “Inquiry into the Means of Consolidating and Digesting the Laws of England.” It is written in the finest tone of irony: sometimes, indeed, so very delicate, that we are afraid it will escape the gross unspiritualized apprehensions of the bulk of readers. It insinuates that the world could well have dis-

pensed with Mr. Twiss's "Inquiry;" for that all the topics therein discussed, and all the improvements therein recommended, had been already discussed, recommended, and exemplified, though with less display, by Mr. Uniacke himself, in his "Letter to the Chancellor." It hints also that Mr. Twiss cannot plead ignorance of the fact, that his "Inquiry" had been anticipated; for that he has most unceremoniously borrowed all Mr. Uniacke's choice ideas, and, with some slight alteration of costume, presented them to the public as his own; that he has, in short, robbed the "Letter to the Lord Chancellor" of its beauties;

Rifled all its sweetness,
Then cast it, like a loathsome weed, away.

Whether Mr. Twiss, by the efforts of his own unassisted genius, may have arrived at the grand results set forth in his "Inquiry," or whether he may have considered Mr. Uniacke's labours as public property, we shall leave others to determine;

Non nostrum ——— tantas componere lites.

From the tone of Mr. Uniacke's two Letters, it would appear that the boldness of his opinions has subjected him to perils and trials, sneers and misrepresentations: so true is it that persecution is the meed of exalted merit. It is gratifying, however, to find that he is possessed of intrepidity and self-devotion to meet the most appalling dangers. In p. 36 of his Letter to the Lord Chancellor, he professes that he "shall think his life nobly devoted" to the cause which he has undertaken; and at the conclusion of the same Letter we have the following inspiring words:

"Whether this proposal shall receive the attention of those in power, to whom it is now addressed, or shall suffer the check which cold neglect too often gives to the best and most rational schemes, will soon be determined: but it carries within itself a vigour, and is supported by a resolution too matured to pine away under neglect, or to yield pusillanimously to the most formidable opposition. *I have seized the helm, my Lord, not, I trust, with a feeble hand—and I hope I shall have patience to endure the calm—and intrepidity to meet the storm.*" Pp. 40, 41.

In the above remarks, we have purposely abstained from touching upon that part of Mr. Peel's speech, in which he professes himself favourable to the appointment of a public prosecutor. It is, perhaps, one of the nicest and most interesting problems in English jurisprudence, embracing so many momentous considerations, and admitting of such a diversity of opinion, that it would be impossible to do it justice in an incidental discussion. Proposing, as we do, to examine the question in all its bearings at an early opportunity, we shall content ourselves at present with congratulating the public, that the improved temper of the legislature has tolerated the recommendation of a change so funda-

mental; the most distant allusion to which would, in the "good old times," have blanched the cheeks of members, and made

Each particular hair (of the Speaker's wig) to stand on end,
Like quills upon the fretful porcupine.

We must reserve our observations upon the Larceny Bill, as well as upon the three other bills, relating to Criminal Law, introduced in the present session, for a future Number, when they will have arrived at some greater degree of legislative maturity.

ART. II.—PROGRESS OF JURISPRUDENCE IN THE UNITED STATES.

1. *A Discourse concerning the Influence of America on the Mind, being the Annual Oration delivered before the American Philosophical Society, at the University in Philadelphia, on the 18th October, 1823, by their Appointment, and published by their Order.* By C. J. Ingersoll. Philadelphia, 1823, 8vo. pp. 67.
2. *A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States.* By Peter S. Du Ponceau, LL.D., &c. To which are added, a brief Sketch of the National Judiciary Powers exercised in the United States prior to the Adoption of the present Federal Constitution. By Thomas Sergeant, Esq., and the Author's Discourse on Legal Education, delivered at the Opening of the Law Academy, in February, 1821. Philadelphia, 1824, 8vo. pp. 254.
3. *The English Practice: a Statement showing some of the Evils and Absurdities of the Practice of the English Common Law, as adopted in several of the United States, and particularly in the State of New York.* New York, 1822, 8vo. pp. 347.
4. *A View of the Constitution of the United States of America.* By William Rawle. Philadelphia, 1825, 8vo. pp. 347.
5. *History of the United States, from their first Settlement as Colonies, to the Close of the War with Great Britain, in 1815.* By N. Hale. London, published by John Miller, 1826, 8vo. pp. 467.

THE advanced and progressively improving, moral, intellectual, and political condition of the United States of North America is the most remarkable and gratifying fact on historical record; and in no point of view is their national superiority so singular as in the

improvement and reform of their judicial establishments, and the ardent cultivation of the science of Jurisprudence.

In order, however, fully to understand the institutions of the United States, it will be necessary to advert to the dates and history of the colonization of each of them. Their laws and legislation are intimately connected with their origin.

It is barely three centuries since the *New World* was unknown to the *Old*. It is not two hundred years since the principal states of North America were a wilderness and endless forest, where the coloured Indian savage dwelt in common habitation with the wild animals of the land. Persecution of religious opinions, and various other causes of emigration, first induced small bodies of our British ancestors to leave their native land and seek for freedom and competency on the shores of the Atlantic: forlorn were the prospects of all, and sad the fate of many of these early settlers; but they carried with them honesty and fortitude, and the motto on their arms was the sentiment of the ancient Greeks—

Περὶ παντός τὴν εὐθερίαν—

Virginia, so named in honour of Queen Elizabeth, was visited by Raleigh in 1584, and in 1607 the first colony was established at James-town.

New England and *Massachusetts* were colonised about the same period. The intolerance of James I. had driven a small society of his English Protestant subjects to Leyden in Holland, where they formed themselves into a sect of Independents, under the care of a pious and exemplary pastor, the Rev. John Robinson. After residing some years in that city, enjoying the respect of the magistrates and citizens, various considerations induced Mr. Robinson and his infant congregation to leave Europe and emigrate to North America. In 1618 they applied to the London or South Virginia Company, for a grant of land: in their written application they stated, "That they were well weaned from the delicate milk of the mother country, and inured to the difficulties of a strange land; that they were knit together by a strict and sacred bond, by virtue of which they held themselves bound to take care of the good of each other, and of the whole; that it was not with them as with other men, whom small things could discourage, or small discontents cause to wish themselves home again."—This pious little clan obtained a grant, and in September, 1620, sailed for Hudson's river, and formed the settlement of New Plymouth.

"Before leaving the ship, the heads of families and freemen, forty-one in number, signed a solemn covenant, combining themselves into a body politic for the purpose of making equal laws for the general good. They ordained that a governor and assistants should be annually chosen, but the sovereign power remained in the whole body of freemen."—*Hale*, p. 35.

In 1630, the city of Boston, and several adjacent towns, were founded by considerable bodies of English emigrants. It was to this struggling colony that Lady Arabella Johnson came as a ministering angel, and, in the words of an early historian of the country, "from a paradise of plenty and pleasure, in the family of a noble earl, into a wilderness of wants." In 1635, Massachusetts received from England some characters of subsequent political celebrity, among whom were Hugh Peters, Sir Henry Vane, then Mr. Vane, and the celebrated Mrs. Hutchinson; and it is well known that Hambden, Haselrig, and Cromwell, were on the point of embarkation for the same distant land, and were only prevented by acts of arbitrary royal power—the exercise of which kept at home persons who ultimately subverted royalty itself!

New Hampshire was colonised about the same period; and *Connecticut* also by a grant from the Plymouth Company to the celebrated Viscount Say and Sele and Lord Brook, in honour of whom the fort and town of *Saybrook* was founded. A large body of the colonists of the latter state, utterly destitute of laws and institutions, subscribed what they termed "a plantation covenant"—solemnly binding themselves, until otherwise ordered, "to be governed in all things, of a civil as well as religious concern, by the rules which the Scriptures held forth to them;" and, in 1639, all the free planters assembled in a *barn* to debate the foundation of their civil and religious polity!

In 1636, *Rhode Island* was granted to a new party of settlers. In 1647, delegates, chosen by the freemen, held a general assembly at Portsmouth, organised a government, and established a code of laws.

The state of *New York* was first visited, in 1609, by Henry Hudson, an Englishman, who discovered Long Island, and the river to which his name was given. The Dutch, the French, and the Swedes formed settlements in various parts of that state, and their contentions are the subject of its early history. In 1682, the first legislative assembly met, consisting of the council and eighteen representatives. By the declaration of the governor, they were invested with the sole power of enacting laws and levying taxes; but the laws could have no force until ratified by the Duke of York, who had received from his brother, Charles II, a grant of all the territory between Nova Scotia and Delaware Bay—a tolerable aristocratical and extensive domain, had his Grace and descendants been able to keep it in the family.

In 1624, and a few years afterwards, *New Jersey* was settled by the Danes, Swedes, Finns, and English. The Duke of York, probably the largest landed proprietor in the world, also obtained a grant of this state; and, in 1664, conveyed the tract, called

New Jersey, lying between Hudson and Delaware rivers, to Lord Berkeley and Sir George Carteret. Lord Berkeley disposed of his property, rights, and privileges in the western territory to Edward Billinge; and the latter, being involved in debt, placed it in trust with William Penn, Lowrie, and Lucas, to be sold for the benefit of his creditors! In 1678, Sir Edmund Andross was sent from England as the sole governor of all the possessions of the Duke of York in America, and began to enforce an arbitrary system of fiscal extortion. The colonists represented to Charles II their claim to the privileges of freemen; that the Duke had transferred his territorial rights and property to Berkeley and Carteret, and they to the then proprietary. One sentence in their remonstrance received a memorable and justly merited practical exemplification in the subsequent abdication of the throne by James II; "Such conduct has destroyed governments, but never raised one to any true greatness." A royal commission adjudged the duties thus imposed illegal and oppressive, and they were not afterwards demanded. In 1682, East Jersey also passed from Carteret to William Penn, and an association of twenty-three quakers: they appointed Robert Barclay, the author of the "Apology for the Quakers," governor of it for life: the colony flourished—persuasion proved a cheaper and a better principle of government than coercion.

In 1627 and 1651, the Swedes and Dutch colonized the state of *Delaware*. In 1664, the settlements were conquered by the English. William Penn purchased a considerable part from the Duke of York in 1682. In 1703, the inhabitants, dissatisfied with Penn's charter, formed a representative and more popular government.

Pennsylvania was founded by William Penn (son of Admiral Sir William Penn), a man of most remarkable though eccentric character. In his youth he joined the Quakers, and while superintending the settlement of New Jersey, became acquainted with the extensive and fertile track lying between the territories of the Duke of York and Lord Baltimore. At Penn's solicitation, and in recompense for the unrequited public services of his father, the King granted him the fee simple of this state, and called it *Pennsylvania*. We have now lying before us a copy of the original London advertisement, and the quarto tract, in which Penn described the country, and enumerated the advantages which it offered to emigrants. (a) Penn presents a good abstract of his legal title to the

(a) A Brief Account of the Province of Pennsylvania lately granted by the King under the Great Seal of England to William Penn, and his

Heirs and Assigns. London. Printed by B. Clark, in George-yard, Lombard-street, 1682. 4to.

property. First "the King's title to this country before he granted it." Then follows William Penn's title from the King, "An abstract of a grant of the aforesaid estate to Penn, dated 4th March, 1681. Also a declaration from the King to the inhabitants and planters of the province, to obey Penn as the lawful grantee and governor." The shrewd Quaker then sets forth the fertility and tempting produce of the country. He then treats of the government, which he states as follows:—"1st. The *governour* and *freemen*, have the power of *making laws*, so that no law can be made, nor money raised, *but by the people's consent*. 2dly. That the *rights* of the people of England are in force there. 3dly. That making no law against *allegiance*, they may make all laws requisite for the prosperity and security of the said province." This bold and singular adventurer, and pacific law-giver, then specifies the "Conditions" of settling: the freehold was sold at the rate of twenty pounds for every thousand acres; leaseholds paid an annual rent of one penny per acre; and before the emigrants embarked, they and the great parent proprietor mutually agreed upon and subscribed "Conditions and Concessions." No stamp acts incumbered and restricted this division of lands, and no cumbersome verbiage of law craft filled skins of parchment to cover the acres. We have thus detailed these interesting facts as the most singular history extant of the founding of a great nation and the origin of its laws.

In the autumn of 1681, three cargoes of settlers sailed for Pennsylvania. The treaty and arbitration of its wise and philanthropic proprietor with the Indian tribes is too well known to require any detail. In April, 1682, Penn published *A Frame of Government*, as he expresses it, "to support power in reverence with the people, and to secure the people from the abuse of power." He published also a *Body of Laws*, which had been examined and approved by the emigrants in England, and which an eminent historian eulogizes as doing "great honour to their wisdom as statesmen, to their morals as men, and to their spirit as colonists." In August of that year, Penn set sail for his principality, accompanied by about two thousand emigrants. In his contract with the Indians he purchased a small tract of land, where he selected the site, and planned the town of Philadelphia, or the city of love, which is proudly advertised as containing before the end of that year eighty houses and cottages! In the new city, a second assembly was held in March, 1683. The delegates and freemen solicited and obtained from Penn a second charter, which diminished the number of the council and assembly, and in several important particulars differed from the first. Many of the clauses and regulations show the eccentricity but philanthropy of Penn, who was really a *friend* to his infant settlement. It was ordained

"That, to prevent *lawsuits*, three arbitrators, to be called peace-makers, should be chosen by the country courts, to hear and determine small differences between man and man: that children should be taught some useful trade, to the end that none might be idle, that the poor might work to live, and the rich, if they should become poor: that factors, wronging their employers, should make satisfaction, and one-third over, &c.: that no one, acknowledging one God, and living peaceably in society, should be molested for his opinion or his practice, or compelled to frequent or maintain any ministry whatever." The following year Penn returned to England, but in consequence of some discontents, again visited the state in 1699. In 1701, he prepared and presented a new charter to the assembly, which was accepted: it more minutely defined the powers and rights of the governors and governed. It gave to the assembly the right of originating bills, which by the previous charter was the prerogative of the Governor alone, and of acceding to or rejecting those which might be laid before them. To the Governor it committed the right of rejecting bills passed by the assembly, of appointing his own council, and of exercising the whole executive power. Much of all this new and changing legislation was certainly experimental, but it was not dangerous, and the eastern hemisphere perhaps is little aware with how much less government a country can do than is generally supposed, and that nations if left to themselves, and the pursuit of their own interest, will quickly discover and adopt the best principles and forms of political government. In the early part of the revolutionary war, the Pennsylvanians adopted a new constitution, by which the proprietor and his family were excluded from all share in the government. He was offered, and finally accepted, 570,000 dollars, in discharge of all quit-rents due from the inhabitants. We must apologise for this long detail, but its connexion with the early and "natural history" of legislation must plead our justification of the recital.

Maryland owes its early settlement and colonization to the persecution of the Catholics in the reign of James I, and the penal laws which were thought preferable to freedom of inquiry and popular education. Lord Baltimore, a nobleman of ancient Catholic family, first visited the Chesapeake-bay, and obtained a grant of territory from Charles I. The new colony was called *Maryland*, in honour of Queen Henrietta Maria. The charter granted to these colonists conferred more extensive privileges than were enjoyed by any transatlantic settlement. It vested in the inhabitants the privilege of passing laws either by themselves or representatives, without any veto or reservation for rejection to the crown. Every freeman originally attended the legislative assemblies in person or by proxy. The rapid increase of population

soon rendered a representative system necessary; and in 1639, an act was passed, constituting "a House of Assembly," to be composed of members chosen by the people, of those summoned or appointed by the proprietor, and of the Governor and Secretary. The power of making laws was entrusted to this body. In 1650, a second alteration was made. The legislative body was divided into two branches, the delegates chosen by the people constituting the Lower House, and the persons summoned by the proprietors, the Upper House; or, after the fashion of the mother country (only changing the terms), a House of Lords and a House of Commons. It has been recorded, and may be opportunely stated, for the honour of Lord Baltimore and his associates, that while the Catholics retained the political power of the province, the Assembly passed no law abridging the liberty of conscience. If their British ancestors were afraid of Roman Catholic influence, *they* did not dread Protestant ascendancy, or seek to restrain it by pains or civil disabilities. At the commencement of the American Revolution, the people assumed the government and adopted the present constitution, and terminated the claims of the Baltimore family to jurisdiction or property.

North Carolina was also granted out and partitioned in the reign of Charles I. Some emigrants from Virginia settled in a track north of Albemarle Sound: they "increased and multiplied" in the usual ratio, and Mr. Hale records that "they acknowledged no superior on earth, and obeyed no laws but those of God and nature." Lord Clarendon and seven other persons obtained a grant from the King in 1663, Sir R. Heath, the original grantee, having failed to perform the conditions of his patent. The new proprietary, to encourage emigration, gave public assurances that all emigrants and settlers should enjoy unrestricted religious liberty, and be governed by a representative system and free assembly. Some discontents arose on the first origin and administration of the government. In 1668, Locke, at the request of the proprietors, prepared a "Constitution." Locke, like his successors in that part of political business (the patriotic and honest Major Cartwright and the industrious Indian legislators in Leadenhall-street), was a bad manufacturer of "constitutions:" there is some difference between the process of detecting and of curing diseases, and at *that* time (the seventeenth century) Locke could more reasonably expose the evils of political mal-administration than compose a code of laws or originate an "Idea of a perfect commonwealth." His North Carolina constitution provided a very Utopian and fashionable form of government, but the means were not adapted to the ends: in the modern phrase of a legislative assembly which rules over the largest colonial system in the known world, it did not "work well."—Locke's constitution pro-

vided that a chief officer, to be called the palatine, and to hold his office during life, should be elected from among the proprietors; that an hereditary nobility, under the name of landgraves and caziques, should be created; and that once in two years, representatives should be chosen by the freeholders. These with the proprietors, or their deputies, were to meet in a parliament, over which the palatine was to preside; but the parliament could deliberate and decide only upon propositions, laid before it by a grand council composed of the palatine, nobility, and deputies of the proprietors. This constitution, however "evenly balanced," and European, was too aristocratic, and but ill-adapted to the sentiments and habits of the people for whom it was prepared. The introduction and enforcement of it soon produced civil dissensions, and in 1693, at the request of the Carolinians, the constitution of Locke was abrogated by the proprietors, and each colony of the state was afterwards ruled by a governor, council, and house of representatives.—*North Carolina*, at the same period, and subsequently in 1729, was entirely disconnected with the southern state, and governed by its own separate legislature.

In 1732, *Georgia*, the southern part of the territory included in the Carolina charter, was colonised from England, and formed a barrier between the Carolinas and the southern Indians. Savannah was the first place of settlement, but the few hundred English paupers, the emigrant refuse of cities, idle and irresolute from the want and degradation which had driven them from their native land, were unable to fell the mighty forests of Georgia. The trustees therefore encouraged by grants of fifty acres of land foreign settlers, and several hundred Germans, Scotch, and Swiss arrived in 1735. "Those pious labourers in the vineyard of the Lord," John Wesley, and George Whitefield, came out as missionaries to assist in the planting of religion, but the thoughts of the future world were of slow propagation until the necessities and wants of the present state had been more overcome. The worldly concerns of this colony were managed by trustees appointed by the charter. In the first instance, lands were not allowed to be sold or devised by the owners, and the law of primogeniture was strictly enforced. The colony in consequence languished, and did not flourish until after these antiquated regulations were abolished. The trustees, too busy in legislation, disappointed in remuneration, and wearied by complaints against their mis-management, surrendered their charter to the crown, and, in 1754, a royal government was established over the colony.

Such is the remarkable and interesting narrative of the early difficulties and unparalleled struggles of these "nurseries of people." Thus did the wilderness recede before a few adventurous

and hardy emigrants, and its savage inhabitants and wild beasts give place to the industry and skill of civilised man!

This introduction to the main subject of the present article has been already too long to allow of any sketch of the later history of the States to the present period. We must refer our readers to Mr. Hale's excellent volume for the most brief and interesting account of the French war of 1756-63; of the revolution and campaigns to the termination of the war; of the adoption of the constitution, and Washington's administration; of the subsequent administrations of Mr. Adams, Mr. Jefferson, and Mr. Madison; and the present state of this extraordinary country. The English reader will also obtain the fullest particulars of the general constitution of the United States, and of the several governments of the different parts of the Union, in a little volume and digest published at New York. (b) The Acts of Congress constituting the territorial governments are not added to this work, because they are altered and modified at almost every session of Congress, and are within the reach of every one who wishes to consult them in the editions of the laws of the United States. (c)

Having thus far wandered, we hope not uselessly, from the text of this article, we proceed to the subject of the jurisdiction of the American Courts, the state of legal education, and the American cultivation and progress of the science of jurisprudence.

The legacy of the law was, perhaps, the only connexion with the mother country, of which the colonies, on the revolution and recognition of independence, could not rid themselves. It was so

(b) "The Constitutions of the United States of America, with the latest Amendments: Also the Declaration of Independence, Articles of Confederation, with the Federal Constitution. New York. Published by E. Duycking, 1820."—Its contents are as follows:—

Declaration of Independence.
Articles of Confederation.
Constitution of the United States.

Maine
New Hampshire.
Massachusetts.

Charter of Rhode Island.
Constitution of Connecticut.

Vermont.
New York.
New Jersey.
Pennsylvania.
Delaware.
Maryland.

Constitution of Virginia.

North Carolina.
South Carolina.
Georgia.
Louisiana.
Kentucky
Ohio.
Tennessee.
Mississippi.
Indiana.
Illinois.

(c) The best digest of the Congress Acts is by Mr. Edward Ingersoll, in one large volume 8vo.—"A Digest of the Laws of the United States of America, from March 4, 1789, to May 15, 1820. Philadelphia, 1821."—This comprehends every thing except the Acts relating to the district of Columbia, the Post Road, and private Acts.

incorporated and engrained in their judicial establishments that, like the ancient ivy encompassing the aged oak, it had become inlaid in its very constitution. British Equity and Common Law form the original and present *substratum* of American jurisprudence. While the United States were colonies, they partook of the national feeling of the English in the idolatrous worship of the Common Law. The grievances which induced them to separate from the mother country were considered as violations of the *Common Law*; and at the very moment when independence was declared, the *Common Law* was claimed by an unanimous voice as the birth-right of American citizens. It was then regarded as synonymous to the British Constitution, with which their political rights were considered to be identified. In the "revolutionary war" against Great Britain, the *Constitution*, or *Common Law*, was appealed to in favour of the principles, which the contending parties respectively maintained: it was esteemed by all with veneration, and cherished as the most precious inheritance. (d) Such is the popular influence of mystical names. The legislature and jurists of America are just beginning to overcome this monster of mystery and prostration to names, and to establish the maxim, "THAT PURE ETHICS AND SOUND LOGIC ARE ALSO PART OF THE COMMON LAW." Some excellent strictures on the Common Law are scattered through the pages of Dr. Du Ponceau's work; and the excellent critique of Mr. Sampson, and correspondence with Mr. Cooper, have been communicated to the English public. Mr. Bentham, in his admirable correspondence (e) with several constituted authorities of the United States, early denounced the defectiveness of this sandy foundation, *Common Law*, and in his characteristic style described as "words in which you have a name, pretended to be the name of a really existing object: look for any such existing object—look for it till doomsday, no such object will you find." This "perfection of reason," according to Blackstone, *per* Lord Coke termed "artificial common sense," is fast pruning away, and will not much longer enjoy the prerogative Ovid ascribes to Proteus;

Sunt quibus in plures jus est transire figuras.

The Common Law of the United States is becoming more and more *malleable*: definition and certainty are supplanting mystical traditions; and, as the late accomplished American Judge Wilson remarked in a charge to a Grand Jury, "the accommodating principle of a system of Common Law (in America) will adjust itself to every grade and species of improvement, and attain, in

(d) Du Ponceau, Preface, p. x. by Jeremy Bentham. London, 1817

(e) See Papers on Codification, 8vo. p. 97.

the progress of time, higher and higher degrees of perfection resulting from the accumulated wisdom of ages." It is hoped that this change of constitution may be shared by its venerable and revered parent on this side the Atlantic—the *English Common Law*. As, in a subsequent number, we intend a separate review of several trans-atlantic works on this subject, we shall suspend any further remarks until that occasion. We shall also postpone to an early number a review of the various Equity Courts of the Union. The consideration of the state and expediency of this jurisdiction has lately undergone a solemn and ingenious debate in the Conventional Legislature of New York; (*f*) the discussions and resolves of which are highly important, and might be made assistant to the legislative measures now before Parliament in the bill, introduced by the Master of the Rolls, for the amendment of our own Court of Chancery. It became a serious and grave inquiry, whether that state should *transfer* or *abolish* the Equity Jurisdiction. Such is the bold and statesman-like conduct of these republican legislators: they submit the evils of *their* judicial system to a *real bona-fide* investigation, and pleading the sanction of age will not bar inquiry, or protect abuse. Mr. Kent, the Ex-Chancellor of the State, the most learned and upright of American judges, took a prominent part in the inquiry. He argued successfully against the abolition, and urged the Convention to establish, and not to destroy—at the same time honestly exposing the defects and abuses of the jurisdiction. (*g*) In that discussion, it is averred that those states which have not a separate court of chancery feel the want of one, and that, where the equity and common law jurisdictions had been blended, great evils existed. Delaware tried both systems; and, in 1799, had divided the chancery powers into a distinct and separate branch: and the question had been decided in favour of that course in South Carolina, after long and deliberate discussion. The Convention ultimately enacted that the legislature might, in their discretion, make provision for one or more vice-chancellors, and regulate their powers from time to time, or vest equity powers in other courts of

(*f*) A Report of the Debates and Proceedings of the Convention of the State of New York held at the capitol, in the City of Albany, on the 28th August, 1821. New York, 1821, 8vo. p. 365.

(*g*) It is curious that, while, on this side the water, we think we can never have judges old enough, the Americans consider they can never have them too young. Mr.

Kent, by an impolitic and anomalous provision in the Constitution of his own State, has been displaced from the office, which he so many years filled with honour and public advantage, because he was—sixty years old! If Mr. Brougham were to introduce such an act into a British House of Commons it would have a singular effect.

subordinate jurisdiction. The details of this interesting and useful inquiry, we shall communicate and review on an early opportunity, as well as some singular facts concerning the equity jurisdictions of the several States. In so occult and mystical a subject as "law as it is," experience, perhaps, is the best guide to law "as it ought to be."

The great victory achieved in America over law-craft is the recognition of jurisprudence as a philosophical science. The transatlantic law now acknowledges the power of logic and the supremacy of principles; and the American legislature does not consider it impolitic to encourage academical schools of national jurisprudence. The *reason* of legal decisions is not considered as the sacred *secret* of twelve high priests of the sanctuary of the law. How long will the present apathy exist in Great Britain to the cultivation of this all-important science? How long will the strange anomaly continue of professorships, comparatively useless, existing only at Oxford and Cambridge, no public seminary being established in London, the metropolis of law and legal education? When will the Inns of Court, formerly so celebrated, cease to be *Inns* in the literal sense of the word, where lodgings and bodily sustenance only are provided; and when will the stores of their public libraries be opened at reasonable hours (early and late), and the youthful student incited to spend his leisure there now devoted to dissipation and the acquirement of bad habits?—Is this national stain to be eradicated by the London University, and jurisprudence once more to be cultivated in the land of Bacon and Hale (A)?

Our *amor patriæ* insensibly leads us home from the subject of our review, the Progress of *American* jurisprudence; but the ties of consanguinity, the relations of parent and child, are too close to be entirely severed, and must plead our apology. We shall leave to future opportunities the detailed examination of the particular judicial establishments of the United States, and proceed to state the general improvements which have been effected in their laws and legal institutions. They are enumerated and detailed in the several works at the head of our article, particularly in the

(A) The interior of an eminent English pleader's or conveyancer's chambers is a curious scene of indolence and frivolity. On an average certainly not five per cent. of its fashionable pupils assist their masters: these wasters are technically termed *blue-bottles*. The only reports they peruse are the newspapers. And in the present state of academi-

cal and legal education, can it be matter of surprise that such should be the case? Where is the young student to be initiated in the general principles and elementary knowledge of his profession? Are treatises on pleading, or "Littleton with Coke upon him," likely to inoculate the law student with a love of his profession?

Dissertation of Dr. Du Ponceau ;—we shall briefly enumerate them.

Treason has been constitutionally defined ; and, by the same instrument, as well as by the constitution and laws of the several states, a right has been secured to every accused party of defending himself by counsel in all criminal cases, without distinction between fact and law. The benefit of the writ of *Habeas Corpus* has not only been secured in the same manner as in England, but its remedy has been extended by the power which the judges have, and exercise of investigating the real merits of each case without confining themselves to the face of the return. The liberty of the press is defined and protected by law. Improved penal laws and an ameliorated and economical prison discipline have succeeded the old sanguinary code and the black holes of the ancient prisons : the *prevention* of crime has been the principle of the improvements of their criminal law and procedure ; a reformatory discipline and excellent penitentiaries have been adopted in every state. Imprisonment for debt has been taken away in several states in favour of women, and there is a general national feeling of abolishing it altogether, and of giving to creditors a more complete and summary power over the property of their debtors than the present laws provide : it is in contemplation to extend the doctrine of liens, and under suitable regulations to make outstanding debts liable to attachment or execution. The bankrupt law has been improved, and is under the further consideration of the legislature.

Civil jurisprudence has also been greatly improved. Of the ancient feudal system nothing remains but a few harmless names and obsolete forms. All the lands sold by the state of New York have been granted allodially in name as well as in substance ; although from custom and verbiage the words “ fee simple ” are used in the conveyances. Estates tail are every where (except in one state) either abolished, or a simple form has been provided for converting them into absolute estates (i). As these facts are now extremely important, from the public and professional desire of improving the laws of real property in our own country, we shall notice, from the information afforded in Mr. Griffith's excellent work, the alteration in the law of estates tail in the several states of the Union. In *four* states, viz. Vermont, Illinois, Indiana, and Louisiana, these fetters of property never were in existence. In one, viz. South Carolina, the statute *de donis* never was in force, but fees conditional at common law prevail. In *twelve* they have

(i) Du Ponceau, p. 115.—The Annual Law Register of the United States, edited by the Hon. William Griffith, formerly Judge of the Circuit Courts of New Jersey, Pennsylvania and Delaware.

been abolished or converted by statutes into fee simple absolute, viz. New York, Ohio, Virginia, North Carolina, Georgia, Missouri, Tennessee, Kentucky, Connecticut, Alabama, Mississippi, and New Jersey; but in the last *four*, a species of estate tail exists for the life of one donee, or a succession of donees *then living*. In *six* they may be barred by deed, acknowledged before a court or some magistrate, viz. Rhode Island, Maine, Pennsylvania, Massachusetts, Maryland, and Delaware; but in the last four may also be barred by fine and common recovery. The exception in which they exist as in England with all their peculiar incidents is the state of New Hampshire.

The doctrine of survivorship in joint tenancy is also done away. The law of primogeniture no longer subsists in any of the states. Manors and copyholds are feudal luxuries unknown. Conveyancing has been reduced to simple forms, and is not now an intricate science. Registries of deeds and mortgages have been established in every state (*j*).

The forms of proceeding in courts of justice have also been greatly simplified, and the number of its officers reduced to a prothonotary or clerk, and a common cryer. The costs of a lawsuit are comparatively trifling, and the law is accessible to the poor as well as to the rich. It is complained that a loose practice has succeeded the old strict forms of pleading, but the practical purposes are confessedly attained; and at all events the evils of the new bear no comparison to those of the old system. The forms of criminal indictments are mainly preserved as the best portion of English law (*k*).

In the Equity jurisdictions and judgments, too much remains of the subtle and nice distinctions and artificial principles of reasoning appertaining to the old European schools.

Doubtless it is desirable that an uniformity of jurisprudence should be effected in all these different states, as far as is practicable and consistent with their peculiar political circumstances. The discordant decisions of so many co-ordinate judicial authorities is manifestly inconsistent and defective, but this will be remedied in a few years; and in the meanwhile they constitute so many useful experiments in the science of jurisprudence. We cannot better sum up this general account of American law improvement than by quoting the following extract from Ingersoll's Discourse:

"The law has been much simplified in transplantation from Europe to America; and its professional as well as political tendency is still to fur-

(*j*) Du Ponceau, p. 115.

(*k*) See Historical Sketches of the Principles and Maxims of American Jurisprudence, in Contrast with the Doctrines of the English Common

Law on the Subject of Crimes and Punishments. By John Milton Goodenow. 8vo. pp. 428. Stubenville, 1819.

ther simpliety. The brutal, ferocious, and inhuman laws of the feudists, as they were termed by the civilians (I use their own phrase), the arbitrary rescripts of the civil law, and the harsh doctrines of the common law, have all been melted down by the genial mildness of American institutions. Most of the feudal distinctions between real and personal property, complicated tenures and primogeniture, the salique exclusion of females, the unnatural rejection of the half-blood, and ante-nuptial offspring, forfeitures for crimes, the penalties of alienage, and other vices of European jurisprudence, which nothing but their existence can defend, and reason must condemn, are either abolished, or in a course of abrogation here. Cognizance of marriage, divorce, and posthumous administration, taken from ecclesiastical, has been conferred on the civil tribunals. Voluminous conveyancing and intricate special pleading, among the costliest mysteries of professional learning in Great Britain, have given place to the plain and cheap substitutes of the old common law. With a like view to abridge and economise litigation, coercive arbitration, or equivalents for it, have been tried by legislative provision; jury trial, the great safeguard of personal security, is nearly universal, and ought to be quite so for its invaluable political influences. It not only does justice between the litigant parties, but elevates the understanding and enlightens the rectitude of all the community. Sanguinary and corporal punishments are yielding to the interesting experiment of penitential confinement. Judicial official tenure is mostly independent of legislative interposition, and completely of executive influence. The jurisdiction of the courts is far more extensive and elevated than that of the mother country. They exercise, among other high political functions, the original and remarkable power of invalidating statutes, by declaring them unconstitutional; an ascendancy over politics never before or elsewhere asserted by jurisprudence, which authorises the weakest branch of a popular government to annul the measures of the strongest. If popular indignation sometimes assails this authority, it has seldom, if ever, been able to crush those who have honestly exercised it; and even if it should, though an individual victim might be immolated, his very martyrdom would corroborate the system for which he suffered. Justice is openly, fairly, and purely administered, freed from the absurd costumes and ceremonies which disfigure it in England. Judicial appointment is less influenced by politics; and judicial proceedings more independent of political considerations." P. 37—9.

As a further evidence of the growing and effective spirit of improvement, the law schools have, during the last few years, increased in a remarkable degree; and some of the most distinguished public characters have not disdained to fill the Professor's chairs. Dr. Du Ponceau, in his inaugural discourse on legal education, delivered at the opening of the Philadelphia Law Academy, proudly appeals to the advancement and superiority of legal academical instruction in the two establishments in Connecticut and Massachusetts, then the only institutions for legal students. At the former place Judge Reeves successfully founded a law school, consisting of students from all parts of the union. In the University of Cambridge, in the state of Massachusetts, a law chair is established, where lectures are regularly delivered by two professors, of eminent knowledge and talents. The Connecticut establishment continues to flourish under the

care of Judge Gould, the successor of Mr. Reeves. Subsequent academical institutions have elevated the profession and science. In the Transylvania University at Lexington, State of Kentucky, there is a chair of civil law, now or lately filled by Dr. Barry; and one of common and statute law, under Mr. Bledsoe. In the University of New York, Mr. Kent, the Ex-Chancellor, fills the established chair of jurisprudence. At Baltimore, Professor Hoffman, and at Northampton, in the State of Massachusetts, Judge Howe and Mr. Mills, member of Congress, lectured to considerable numbers of students, and probably now continue their useful labours; and other similar institutions may exist in the remoter states. Some excellent remarks are made by Ingersoll, on the legal education of the American students:—

“The education for the bar is less technical, their practice is more intellectual, the vocation is relatively at least more independent in the United States than in Great Britain. Here, as there, it is a much frequented avenue to political honours. All the chief justices of the United States have filled eminent political stations, both abroad and at home. Of the five presidents of the United States, four were lawyers; of the several candidates at present for that office, most, if not all, are lawyers. But without any public promotion, American society has no superior to the man who is advanced in any of the liberal professions. Hence there are more accomplished individuals in professional life here, than where this is not the case. Under other governments patronage will advance the unworthy, and power will oppress the meritorious. Even in France, where there are, and always have been, lawyers of great and just celebrity, we sometimes see that for exerting the noblest, and, in free countries, the most common duties of their profession, for resisting the powerful and defending the weak, they are liable to irresponsible arrest, imprisonment, and degradation, without the succour and sanctuary of a free press and dauntless public sympathy. In Great Britain, it is true, there is no such apprehension to deter them; and equally true, that professional, as well as political, dignities are free to all candidates. But the ascendancy of rank, the contracted divisions of intellectual labour, the technicality of practice, combine with other causes to render even the English individuals, not perhaps inferior lawyers, but subordinate men.

“British jurisprudence itself, too, that sturdy and inveterate common law, to which Great Britain owes many of the great popular conservative principles of her constitution,—even these have been impaired by long and terrible wars, during which, shut up within their impregnable island, the offspring of Alfred and of Edward,—infusing their passions, their politics, and their prejudices, into their laws, have wrenched them to their occasions. The distinguishing attributes and merits of the common law are, that it is popular and mutable; takes its doctrines from the people, and suits them to their views. While the American judiciary enforces this system of jurisprudence, may it never let wars, or popular passions, or foreign influences, impair its principles.” P. 39, 40.

The zeal of the members of the legal profession in North America, to extend the bounds of legal science, and to improve their jurisprudence by the study of that of other nations, ancient and modern, is little known, and still less imitated in England, where

we are content with the dusty and superannuated folios of Grotius, Puffendoff, and Vattel. The Americans have a Law Journal, of which seven volumes had been published in Philadelphia in 1824, edited by Mr. John E. Hall, the contents of which bear ample testimony to the above facts. Mr. Wheaton, the official reporter of the decisions of the Supreme Court of the United States, has placed at the end of his several volumes of Reports an appendix of learned notes, giving comparative views of the laws of different countries which are treated of in the body of the work: we have not seen the ninth volume, but understand that it contains an epitome of the laws of Spain. A great number of the works of eminent foreign authors, Roccus, Bynkershoek, Martens, Schlegel, Pothier, Emerigon, Valin, Jacobsen, and many others have been translated by the American jurists from various languages, and published, some of them with erudite and useful notes. Two different translations have appeared of the French Commercial Code, and one of the Criminal Code, all with copious notes by different transatlantic writers. Mr. Cooper has published an edition of Justinian's Institutes, with a translation, and very learned annotations, in which he compares the Roman system of jurisprudence with that of the United States (1). The few English works of merit on legislation and jurisprudence are speedily reprinted in America; and our transatlantic brethren, so far from jealousy, have a most filial and reverential respect for the productions of British mind. Several of the recent American works on penal law are known to the English reader, and are cited in Mr. Montagu's able and philanthropic publications in favour of the abolition of capital punishments. Many publications on the Common Law, practical and corrective, have been enumerated in the pages of this article. Several admirable essays also, and much valuable information on the state of American law, may be found in the volumes of that superior and well-conducted periodical work, the North American Review.

We have now completed a rapid and general account of the judicial institutions and progress in jurisprudence of this marvellous country. We have no desire to magnify her national merits or superiority, or to establish an invidious comparison with the courts or law of our own country. Great Britain and America

(1) The Institutes of Justinian, with Notes, by Thomas Cooper, Esq. Professor of Chemistry, at Carlisle College, Pennsylvania, Philadelphia, 1812, 8vo. pp. 714. England has the honour of giving birth to this intelligent jurist, who abandoned the English bar and emigrated to Ame-

rica at the period of the French Revolution, disgusted with the political persecutions in Europe. He is known to the English metaphysical reader by a volume of essays, which, with the late edition of Justinian, richly merit re-publication in his native country.

are "bone of bone, and flesh of flesh." No temporary wars or jealousies can long sever the natural and beneficial connection that must ever subsist between the two countries. The Americans must ever look back on Europe with the feelings of grateful recollection every posterity bears to its ancestors. On the other hand, their greatness is our pride. British blood and intellect was the germ of transatlantic prosperity. Through their medium our language will acquire an extension which no other ever possessed; and as the patriarchs of old rejoiced in the multiplication of their offspring, so must every English heart hail—American prosperity and aggrandisement. May the governments of the two empires ever respond to these feelings. Since the acknowledgment of American independence we have gained experience, dear bought, confessedly, which has dispelled the illusions of the colonial system: we have learned that so far from its being the great part of our power, it is the whole of our weakness. That a monopoly of colonial produce is not gainful; that, so far from any revenue being obtained from distant settlements, they never cover their prime cost. It has been made manifest that, supposing we had a right now to govern the American states, and they the inclination to be governed by us, we should get nothing by governing, but gain every thing by parting with them. This, however, is a lesson the pages of which are not yet all learned.

Other and most important points of instruction may be derived from the history of America: we shall perceive that a rapid increase of national prosperity has accompanied the reform of the English law, and we shall learn to disregard those forebodings of evil by which the enemies of legal amendment—the friends of antiquated abuses, still endeavour to deter us from the task of reformation. In 1820, the Republican population had more than doubled in less than twenty-five years, and contained 9,642,150 souls! New roads, canals, and railways, are daily giving greater activity to internal commerce, and justly may their statesmen and orators indulge the loftiest anticipation for the future. The universal diffusion of knowledge, and the consequent industrious, frugal, and moral habits of the people, have worked political miracles which would have scared the faith of our feudal ancestors. The progress of education, and the ravenous appetite for knowledge is almost incredible: Schools and Universities increase and flourish co-extensively with population in all parts of the Union; they are founded by the state, and even travelling libraries are provided where needed. The cheap publication of books encourages a demand and supply unexampled in any European state. A few facts will astonish the reader as detailed in *Ingersoll*. A capital of 125,000*l.* was invested in one edition and reprint of *Rees' Cyclopædia*, and many classes of the engravings are equal to those

of the British artists. There have been eight editions, comprising 7,500 copies of Stewart's *Moral Philosophy*, published during the last twenty years; a greater number we suspect than has been sold in its own country: this latter fact is a remarkable proof of the inquiring taste and reflective character of the public mind in the Union. 200,000 Copies of Sir Walter Scott's novels have issued from the American press in the last nine years! Periodical works and newspapers abound in extraordinary and countless quantity. Four thousand copies of the *Edinburgh and Quarterly Reviews* are republished there, and the same number of copies of a home periodical, of real and increasing celebrity, the *North American Review*. The itinerant book trade is peculiar to this knowledge-seeking country: more than two hundred waggons travel through the country loaded with books for sale! Five thousand post-offices distribute private and public intelligence throughout this amazing Union, traversing, with punctual celerity, 80,000 miles of post-roads, 21,000 miles every day! An internal navigation of 10,000 miles now belts this country from the great western valley to the waters of the Hudson and Chesapeake.

No traitor has yet forfeited his life to American law! State prosecutions never bring licentiousness or infidelity into notice and publication, or provoke, stimulate, and disseminate that which otherwise would be smothered in its own obscurity and insignificance. Religion, although deriving no pillars from the state, is possessed of 8000 places of public worship, and guarded by 5000 ecclesiastics; "intolerance is disarmed by being let alone," and the various-Christian sects agree to differ. Negro slavery, which has been so long an opprobrium to the boasted land of freedom, for the institution of which, however, the mother country must bear the blame, will cease in the state of New York in 1828, and, as we are informed, in every northern and eastern state in 1830.

Mr. Hale concludes his interesting history with the following impressive and eloquent exhortation to the people of the States:—"The Citizens of this Republic should never forget the awful responsibilities resting upon them. They constitute the oldest nation on this western hemisphere; the first on the list of existing republics. They stand forward,—the object of hatred to some—of admiration to many—of wonder to all; and an impressive example to the people of every country. To them is committed an experiment, successful hitherto, the final result of which must have a powerful influence upon the destiny of mankind; if favourable and happy, the whole civilized world will be free; if adverse, despotism and darkness will again overshadow it. May they ever be sensible of the vast importance of their example. May they never betray their sacred trust."

We shall now conclude an article which has greatly exceeded our anticipated bounds, and in our future pages present to our readers details of the several topics here only generally reviewed. In this account of the state and progress of American Jurisprudence, we have confined ourselves almost exclusively to *facts*, because the judicial improvements and legal advancement of the States would otherwise scarcely receive credit on this side the Atlantic. Of the *causes* of their national greatness we have observed little; they may be comprised in one word—*Liberty*, and in the great sentiment of the Roman historian—*Civitas incredibile memoratu est, adeptâ libertate, quantum, brevi creverit.*

ART. III.—OFFICE OF CORONER.

A MEETING of the Coroners of England and Wales was recently held for the purpose of preparing a petition to Parliament, the ostensible object of which was to pray for an amendment of the laws relating to the office of Coroner. The meeting was a close one; all reporters for the public press, or other persons through whose means publicity might be given to the deliberations of the Coroners, having been cautiously excluded. It has been well observed, that when reason is against a man, or class of men, the man or class of men is sure to be against reason; and it may be predicated with equal truth of all secret assemblies, that they are against publicity, because publicity is sure to be against them. Owls shun the light because their organs of vision are too weak to bear it, and in like manner nature has kindly provided against the danger to which men of weakly morality might otherwise be subjected, by endowing them with an exquisite sensibility to the inconveniences of exposure. We are by no means prepared to say, that the horror of publicity which has so long characterised Coroners and their proceedings, is attributable in all cases to a taint in the morality of these officers: in many instances we should be disposed to ascribe it rather to a lack of wisdom than of virtue. But the suspicion of the public is excited, and justly excited, whenever any attempt is made on the part of Coroners, in their official capacity, to elude that salutary control, from which even the highest judicial functionaries in the kingdom do not attempt to claim exemption; and a portion of suspicion or discredit must also attach to their proceedings, when they meet together to deliberate with closed doors on the best mode of petitioning the legislature for an improvement of what they profoundly termed in their advertisement the *Lex Coronatoria*.

It needs no marvellous sagacity to anticipate the result of the deliberations of a snug meeting of Coroners, shut up in a tavern, for the purpose of suggesting, by way of petition, to Parliament the best means of amending the law affecting their own offices. What, in point of fact, was the issue of their deliberations? The secrecy, in which they took care to intrench their proceedings, has of course prevented the public from knowing any thing of the premises which led to their enlightened conclusions;—posterity will know nothing of the reasoning, or the eloquence, or the erudition, expended by the assembled Coroners of England and Wales at the Exchequer Coffee-house, but it may be reasonably presumed that the utmost unanimity prevailed in respect to the substance of the petition, upon which they ultimately decided, for they finished by petitioning Parliament to amend the *Lex Coronatoria*, by increasing the fees and emoluments of Coroners.

That the laws affecting the office of Coroner require legislative revision, no man, who has reflected upon the subject, or who is aware of the abuses connected with the present mode of discharging the duties of the office, can doubt; but no man, we apprehend, who is free from the prejudices or potations which inspired the deliberations at the Exchequer Coffee-house, will believe that the remedy suggested by the Coroners of England and Wales is calculated to improve the present state of the law, or to correct existing abuses. The remarks of the Home Secretary, in a short discussion which took place on this subject in the present session of Parliament, on the avidity with which the office of Coroner is sought whenever it becomes vacant, furnish, we think, a conclusive answer to the complaint of inadequate remuneration. Whole counties have been agitated by contested elections for the office; in Staffordshire a second contested election recently took place, the first having been set aside on the ground of informality; and in Worcestershire, more freeholders, we believe, voted on the election of a Coroner, than for the Knights of the Shire. The complaint of the inadequacy of the allowance made for travelling expenses and of the fees for taking inquisitions is, in reality, founded upon a partial view of the question, for no class of men understands better than the Coroners of England and Wales that the direct emoluments of an office are not always to be taken as a measure of its value. The salary of the head-master of Eton College does not, we believe, exceed 40*l. per annum*, and the head-waiter of the London Coffee-house pays 100*l.* a-year for his situation. Now we will put it to the sagacity of any one of the Coroners of England and Wales who assembled at the Exchequer Coffee-house, and, after the petition concocted at that place of entertainment, we have a very exalted opinion of their sagacity, whether he believes that,

in the first of the instances we have just mentioned, the reverend grammarian really submits to the drudgery of flogging five hundred boys out of false quantities at less than two shillings per head *per annum*; or whether, in the other instance, he believes the head-waiter to be an injured individual, from whom the proprietor of the London Coffee-house, not content with withholding all remuneration for his services, exacts 100*l.* a-year as a premium upon his own injustice. The fact is, that the office of Coroner is eagerly sought after by professional men, even in the obscurest counties of the kingdom, not on account of the direct emoluments attached to it, but on account of the power and the distinction which it confers. It is in these collateral advantages, to say nothing of less legitimate sources of profit, which ought undoubtedly to be rejected from the argument, that Coroners find an ample remuneration for their services. Power is remuneration; distinction is remuneration; increase of business, the necessary consequence of increased power and distinction, is remuneration.

If the numerous instances of competition for the office, and the large sums frequently expended in contested elections by a class of men who have generally rather a keen eye to their own interests, and who are seldom chargeable with an improvident outlay of capital, prove incontestably that the office is worth possessing, and consequently not underpaid; it is scarcely necessary to advert to other considerations which tend to prove the inexpediency of increasing the fees and salaries of Coroners. If the fees for taking inquisitions were doubled, the temptation to holding unnecessary and vexatious inquisitions would be proportionally increased. Burthened too as the landed interest is, in common with all classes of the community, the increase of the county rates which would be occasioned by raising the salaries of Coroners is a consideration of no light importance; nor is it any answer to this argument against an augmentation of their fees, to maintain, as one of the Coroners has done, in a letter addressed to a public journal, that the sums now paid by parishes towards defraying this charge are so inconsiderable, that the proposed increase would not be felt; for if a tax be unnecessary, it is not the less unjustifiable because it can be shown to be but a trifling addition to the burthens under which the country is already labouring.

It has been said that, if Coroners be underpaid, they will be tempted to seek remuneration by indirect means, against which, if they were adequately remunerated by law, their moral principles would revolt. We doubt whether any Coroner, whose moral principles are in a condition to be affected by the difference between an allowance of 40*s.* and 20*s.* for holding an inquest.

or between an allowance of 9d. and 4½d. a mile for travelling expenses, would be greatly shocked at any favourable opportunity of enlarging his pecuniary resources, or, as the gentlemen closeted at the Exchequer Coffee-house would say, of improving the *Lea Coronatoria*. We cannot help thinking, that the sound principle in legislating on this subject would be, not to consent to a compromise with the cupidity or immoral propensities of individuals, who are unworthy of holding an important and honourable office, but to obviate the necessity of such a compromise by raising the qualifications of the officers, and thereby removing, as far as legislative provisions can remove, the temptation to abuses. The eagerness with which the office is sought shows that this experiment may be safely made, and it will be a far more salutary as well as a cheaper course, to endeavour to raise the office to its ancient respectability, than to aim at reconciling the honourable discharge of its duties with the interests of men who are unworthy of holding it.

The office of Coroner was originally one of co-ordinate dignity and importance with that of Sheriff, and even, at this day, where just exception can be taken to the Sheriff, either from suspicion of partiality, or on the ground of his having an interest in the suit, process should, by law, be awarded to the Coroner instead of the Sheriff, for the execution of the King's writs. In the writ at common law *de coronatore eligendo*, says Mr. Justice Blackstone, it is expressly commanded the Sheriff—" *Quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere.*" And, in order to effect this the more surely, it was enacted by the statute of Westminster 1, that none but lawful and discreet knights should be chosen; and there was an instance in the 5 Edw. III. of a man being removed from this office, because he was only a 'merchant.' By this statute Coroners were expressly forbidden to take any reward under pain of forfeiture to the King, and Mr. Justice Blackstone seems to attribute in a great measure to the allowance of fees, by the statute 3 Hen. VII. c. 1, and subsequent enactments, the disrepute into which the office of Coroner had fallen. On this subject Sir E. Coke, in his commentary on that part of the statute of Westminster 1, which prohibits Sheriffs, Coroners, &c. from taking any fee or reward for discharging the duties of their offices, has the following remarks:—"It is a certain and true observation that the alteration of the common law is most dangerous, whereof you shall elsewhere read some instances; whereunto you may add this ancient maxim, affirmed by our Act of Parliament; for while Sheriffs, Escheators, Coroners, and other ministers of the King, whose offices any way did concern the administration or execution of justice, or the good of the commonweal, could take no fee at all for doing their office,

but of the King, then had they no colour to exact any thing of the subject, who knew that they ought to take nothing of them. But when some Acts of Parliament, changing the rule of the common law, gave to the said ministers of the King fees in some particular cases to be taken of the subject, whereas before without any taking at all their office was done, now no office at all was done without taking."

It is not necessary in this place to enter upon the question, whether public services are likely to be better discharged by paid or unpaid functionaries, because we contend that Coroners are in effect amply remunerated for their services; that the frequent instances of competition for the office furnish decisive evidence of its value even under the existing law; and that this fact is of itself an answer to any application that may be made to the legislature for an increase of their salaries. Blackstone complains of the culpable negligence of the country gentlemen, who had suffered the office to fall into the hands of low and indigent men, who desired to be chosen solely for the sake of their perquisites, but we believe that in the present day candidates for this office are in general stimulated by higher objects of ambition than the direct emoluments attached to it, and that an improvement has been gradually taking place, in respect to the character of Coroners, partly in consequence of the office being more generally filled by professional men, than it was in the time of Blackstone, and partly in consequence of the increased respectability of the profession itself. These causes have been slowly working a spontaneous cure of some of the evils arising from the ignorance or venality of Coroners; but it must be acknowledged that much still remains to be done, and that an effectual remedy can only be expected at the hands of the legislature.

The objects to which the attention of the legislature may, perhaps, be most usefully directed in revising the laws affecting the office of Coroner are, first, the establishment of adequate securities for the competency and responsibility of persons holding the office; and, secondly, the establishment of sufficient checks against abuses of the power with which Coroners are invested. To effect both these objects little more would be necessary than to revive the spirit of the old law by raising the qualifications of Coroners, as far as may be practicable, to the standard of the statute of Westminster 1, without touching existing provisions as to fees and emoluments, and also to remove all doubts as to the nature of the jurisdiction of Coroners, and the illegality of the power frequently assumed by these officers of excluding the public from their Courts. The Coroner's Court, though it has lost much of its ancient dignity, is in reality an institution of greater utility than many of the institutions for which we are in the habit of extolling the

wisdom of our ancestors. It is not commonly classed among the blessings which distinguish us from surrounding nations; it is not toasted in taverns, nor called a palladium of the Constitution; but, in a country where the system of police is acknowledged to be most defective, it has been a more powerful instrument towards securing the detection and punishment of great crimes, than the most rigorous systems of police unaided by similar institutions in other countries. In the capital of France, for instance, where there is no institution similar to that of the Coroner's inquisition, not a week passes in which the bodies of persons, bearing evident marks of assassination, are not exposed at the Morgue, and regarded with perfect indifference by the public, no inquiry being ever made into the circumstances by which such unfortunate persons came to their death, unless the relations of the deceased are sufficiently wealthy to put the law in motion. The holding of inquests in cases of *felonia de se* may also be regarded as a useful branch of the duties of Coroners, in so far as inquiries into cases of suicide, considered as a crime against the state, may be supposed to have the effect of checking the commission of the offence. In this point of view, however, little benefit would seem to have accrued from the institution, if there were any ground for the belief very generally entertained by foreigners, that suicide is of more frequent occurrence in England than in any other country; (a) but the probability is that the very institution of Coroners' inquests, by giving publicity and attracting attention to every case of self-murder that occurs in this country, has also given rise to the erroneous opinion that suicide prevails here to a greater extent than in other parts of Europe. The provision which enjoins the holding of inquests in all cases of death occurring in prisons is also founded in wise and benevolent considerations, though the ignorance and partiality of Coroners have done much towards rendering it nugatory. The cases of Mr. Devenish and others, who have fallen victims to that barbarous system which consigns insolvent debtors to misery and death in prisons, of which the internal regulations are more inhuman than those of gaols appropriated to the reception of the worst criminals, have attracted so much of

(a) Holberg, a Danish writer, pleasantly assures his readers that the taste for hanging, and particularly auto-suspension is so prevalent in England, that criminals to whom the law prescribes the time at which this taste is to be gratified, go with alacrity to the place of execution, and, in the absence of executioners, frequently hang them-

selves! Quæ gens Anglicâ ditior, ac in quâ simul gente suspendia frequentiora? Ad loca supplicii non ducuntur Angli, sed currunt, ridendo, cantando, facetias spargendo, et circumstantibus insultando moriuntur; et, ubi desunt carnifices, se ipsos sæpe suspendunt.—Holbergii Opusc. tom. 2, p. 118.

the public attention, that the recent conduct of Coroners at the inquests held on the bodies of those unfortunate persons will fall more properly under our notice in a distinct article, which it is our intention to devote to the subject of prison police.

The abuses to which the power, with which Coroners are invested is liable, are the holding of unnecessary and frivolous inquisitions for the sake of enhancing their fees, and the smuggling of juries, or the total suppression of inquests in cases where sufficient inducements can be held out by wealthy relatives of the deceased. Cases have also occurred in which money has been extorted by Coroners for not holding inquests: (See East, P. C. 382, *King v. Harrison*); cases of bribery, however, for the suppression of inquests are probably of more frequent occurrence than those of extortion; and this abuse can only be adequately guarded against by electing men to the office whose respectability may place them above temptation. Some years ago the daughter of a man of rank and title, co-heiress with a younger sister to property of a considerable amount, was charged with having wilfully poisoned her sister, under pretence of administering some medicine which had been prescribed for her. The sister died suddenly after a short illness apparently insufficient to produce death; the charge was made, not indeed publicly, but so unreservedly as to be sufficiently notorious at the time to a number of persons connected or acquainted with the parties, and to be capable, in all probability, of easy recognition, at this day, by many readers of these pages. The great respectability of the persons who made the accusation seemed to negative the possibility of its having originated in malicious motives, and it was even affirmed that there were appearances on the body of the deceased tending to confirm the suspicion of her death having been produced by poison. No inquest was held, whether from the fault of the Coroner after notice given, or of the accusers, who, if they believed that so atrocious a crime had been perpetrated, were bound to see that it did not pass unpunished, we know not, but the case is calculated to show the necessity of electing none but men of high character and inflexible integrity to the office of Coroner—men who would be prepared, under such circumstances, to discharge their duty without regard to the rank of the parties, and either to bring the guilty to punishment on the one hand, or to establish by strict investigation the malice of the accusation on the other; for such an accusation could scarcely have been made by persons, moving in the same rank of life with the party accused, upon light grounds; and if not true, it was in all probability malicious. It may be observed here, that the *searchers* appointed by parishes commonly receive a consideration for the non-performance of their duty; and, where strong reasons exist for preventing the inspection of the bodies of deceased persons, the amount of the

bribe may be considerable; Coroners, however, may act on any information, as well as that received through the medium of parish officers.

The exclusion of the public from the Courts of Coroners is rather an assumption, than an abuse of power, on the part of the Coroners who have resorted to it; for there is not the slightest authority or pretence for contending that the Coroner's Court is not an open court. The nature of the institution, the language of the Mirror, the words of the Statute of Edward I, *De Officio Coronatoris*, and the forms of the proceedings on inquisitions of death, all show conclusively that the Coroner's Court is a court open to all his Majesty's subjects. In the 4 Edw. I, st. 2, it was declared to be the duty of the Coroners "*quod accedant ad occisos*," and "*si quis talium occisus fuerit in campis vel boscis et ibi inveniatur*," they are directed to inquire into the mode in which he came by his death. It seems evidently, therefore, to have been the intention of the legislature that the Coroner should sit at the very place where the body was found, in order that he and the jury might judge of the manner in which the deceased came by his death, not only by inspection of the body, but by an examination of the surrounding objects, and accordingly Sir W. Blackstone observes in his Commentaries, I, 348, "he must sit at the very place where the death happened." Since the days of Shakspeare, Crowner's-quest law, and Crowner's-quest logic have continued to afford abundant materials for ridicule; but, though Coroners have a prescriptive privilege to be absurd, a close court in the open air, a close court "*in campis vel boscis, si corpus ibi inveniatur*," is a phenomenon, upon which even Coroners will hardly be prepared to insist. But if it be too much to expect that all Coroners, under the existing system, should understand the language of the Statute, which defines and regulates the duties of their office, the forms of the proceedings on inquisitions of death, might surely have suggested to the most ignorant of the body, that the Coroner's Court is an open court, and that they have not the slightest authority or pretence for excluding the public.

After the Coroner and the Jury have examined the body, and the Coroner has concluded his opening charge to the Jury, the officer of the Court makes the following proclamation.

"If any one can give evidence on behalf of our Sovereign Lord the King, when, how, and by what means A. B. came to his death, let him come forth, and he shall be heard." And on the appearance of each witness, the Coroner takes down his name, abode, and occupation, and then administers the following oath, "the evidence which you shall give, &c."

Are not the terms of this proclamation, a proclamation ad-

dressed to all mankind, sufficient to show that the proceedings of the Court must necessarily be public, and can any man but a Coroner of the densest capacity imagine that such a proclamation is consistent with the supposition that his Court is a close Court, from which he has the right of excluding his Majesty's subjects?

There is a passage in Umfreville's Book on the Law and Practice of the Office of Coroner, edited by Grindon, which may have misled some ignorant officers, though we can scarcely give the Coroners, who have insisted on the right of excluding the public, credit for founding their assumption of power even on that slender authority. "It sometimes happens," says this writer, "that meddling persons intrude themselves upon the Court and Jury. It is the Coroner's duty to prevent any such interruption. Counsel have sometimes claimed a right to examine witnesses. Their *right* appears to be at least doubtful, although it might be injudicious to refuse it." *Umfreville's Lex Coronatoria*, by Grindon, p. 183. The accuracy of this writer's opinion as to the right of counsel to address the Coroner's Court may be estimated by a reference to Barclee's case, which is reported in Siderfin.

In this case, an inquisition had been taken before the Coroner of Middlesex, on the body of *Barclee*, who had been found drowned; and it had been found *felo de se*, and it was moved that the inquisition should be quashed, for that the Coroner had not examined witnesses for the administrator of the *felo de se*, and *Turner*, of Gray's-inn, observed, that he never heard that counsel were allowed before a Coroner in cases of *felo de se*. Per Glynn, C. J., "the Coroner ought to allow counsel and witnesses on both sides, as well for the *felo de se* as for the King, if required; for as the law has greatly favoured inquests before Coroners, in not permitting them to be traversable, they ought not to do wrong, and conceal the truth, which is a thing odious to the law. And as the Coroner has not allowed counsel for the administrator of *Barclee*, the Court will not suffer the inquisition to be filed." And a new inquisition was accordingly ordered to be taken.

As there is no part of the conduct of Coroners, which has had so direct a tendency to render them odious to the public as their attempts on various occasions to establish the right of holding secret inquisitions, and as the assumption of this right is calculated to lead to the worst abuses, it is extremely desirable that this question should be set at rest, either by a decision of the Judges of the Court of King's Bench, or by a declaratory measure on the part of the legislature.

Some degree of medical knowledge seems to be necessary for the due discharge of the duties of the office of Coroner; in fact, the law connected with these duties lies within a very narrow compass, while the medical knowledge that may be necessary to arrive at

sound conclusions in many doubtful cases of poisoning, infanticide, &c. on which the Coroner is called upon to pronounce an opinion judicially, though fortunately not in the last resort, on the guilt or innocence of the prisoner, embraces a wide field of investigation. The appointment of medical assessors is suggested in Paris and Fonblanque's Medical Jurisprudence, with a view of assisting the Coroner in the discharge of his judicial duties. The additional expence which would be incurred by the adoption of this suggestion would probably be successfully urged as an objection to it; but candidates for the office of Coroner might at any rate be required by the legislature to produce certificates of their having attended certain courses of lectures on medicine, surgery, and especially on forensic medicine, or the science which teaches the application of the principles of medicine, physiology, and chemistry, to such facts and circumstances as may become the subject of forensic investigation. We should be glad if Mr. Hume would move for a return of the cases for the last three years in which verdicts of wilful murder have been returned on Coroners' Inquests, distinguishing those in which the prisoners have subsequently been convicted, acquitted, or found guilty of manslaughter, and also in alleged cases of infanticide, distinguishing those in which the prisoners have been found guilty of the minor offence of concealment of the birth. Such a return would tend to show how far persons may be unnecessarily put upon their trial; and we allude more especially to cases of alleged infanticide, through the ignorance of Coroners, and to prove that, if Coroners were better informed, much expence might be saved to counties on one hand, and, which is a far more important consideration, many innocent individuals rescued from the hardship of unmerited imprisonment and exposure.

We have touched briefly on some of the points, which appear to us to be deserving of consideration in any attempt which may be made to revise the law affecting the office of Coroner; but the subject is an extensive one, and we must reserve to ourselves the privilege of returning to it on a future occasion. Above all, we shall not lose sight of the conduct of Coroners, when they have been called upon to discharge one of their most important functions—that of holding inquisitions on the bodies of persons who have died in prisons. The disposition recently manifested to defeat the real object of these investigations is no new feature in the administration of this branch of the law of Coroners; the tendency of which administration has been upon almost all occasions to stifle inquiry, to screen gaolers, and to perpetuate existing abuses. We perceive, while we are committing these observations to the press, that the indefatigable member of the House of Commons, to whom we took the liberty of suggesting a subject

of useful inquiry, could, with difficulty, obtain a hearing on a question so abhorrent from the feelings of gentlemen as that of prison regulations; and that it required all his perseverance and intrepidity to overcome the impatience and the merriment which so vulgar a topic was calculated to excite. It is not surprising that some gentlemen, who deem no amount of human suffering too high a price for the quiet enjoyment of their customary amusements, should think it an intolerable encroachment upon their tranquillity to be bored with details of the sufferings of low people, who are liable to be sent to gaol for debt, and to die there *from exposure to the inclemency of the weather!* They who win may laugh; but we are glad to see that derision was not the only answer to Mr. Hume's statements, and that the subject of prison regulations is likely to be inquired into by a member of the government, who takes a far different estimate of the importance of any investigation which has for its object the alleviation of human suffering. "The greatest happiness of the greatest number" is the problem to the solution of which the efforts of all good government should be directed; but we fear that, when the elements which enter into the solution come to be investigated, the *negative* quantities will be found greatly to preponderate, and that the practical object of legislation must generally be rather to limit and to mitigate the sufferings, than to increase the positive enjoyments of mankind.

ART. IV.—CONSOLIDATION OF THE BANKRUPT LAWS.

6 Geo. 4, c. 16.

An Act to amend the Laws relating to Bankrupts.

WHILE the law of Bankruptcy was dispersed in above twenty-one statutes (a), and the interpretation to be sought in as many hundred cases (b), and no small number of text books (c), each,

(a) 34 & 35 H. 8, c. 4; 13 El. c. 7; 1 J. 1, c. 15; 21 J. 1, c. 19; 13 & 14 C. 2, c. 24; 10 Ann. c. 15; 7 G. 1, c. 31; 5 G. 2, c. 30; 19 G. 2, c. 39; 24 G. 2, c. 57; 36 G. 3, c. 90; 37 G. 3, c. 124; 45 G. 3, c. 124; 46 G. 3, c. 135; 49 G. 3, c. 121; 56 G. 3, c. 137; 1 G. 4, c. 115; 3 G. 4, c. 74; 3 G. 4, c. 81; and 5 Geo. 4, c. 98, leaving several sta-

tutes and parts of statutes still unrepealed.

(b) In 1810, the cases in bankruptcy had become so numerous and important that Mr. Rose adopted the course of reporting them as a distinct class, in which he was followed by the late Mr. Buck, and now by Messrs. Glynn and Jameson.

(c) Christian, Cooke by Roots,
E 2

in some respect, differing in doctrine from the other, it was not surprising that the great mass of the trading population of the country should be utterly ignorant of the system under which their fortunes, their persons, and, until very lately, their lives also, were disposed. Even among lawyers, very few were thoroughly conversant with this branch of judicature; Mr. Cooke, we believe, was the first who made it a separate department, a few gentlemen of the Court of Chancery have followed the example, and there are now some half-dozen barristers without the bar (*d*) who are contradistinguished as bankruptcy lawyers. We do not hesitate to avow our opinion that this division of labour or business is advantageous to the profession, and, yet more so, to the public. In the present massive and complicated state of the law, it is as much as any ordinary intellect can accomplish to have a general knowledge of the whole, and a perfect acquaintance with one or two of its parts. We are in the habit of ridiculing the Irish bar for running from Court to Court, from Chancery to the King's Bench, from the Sessions to the Exchequer; and yet our practitioners, especially in equity, are chargeable with similar, if not equal, absurdity. In a single morning they fly from real property to bankruptcy, from lunatics to tithes, from an injunction to restrain the manufacture of chlorine to the piracy of "Cherry Ripe;" and that too, with as much assumed facility, as if the circle of the arts and sciences were at their fingers' ends, and the gloomy chaos of the law waited their *fiat* only to spring into light and order. The seniors more especially are chargeable with this affected versatility of genius, and would, we are convinced (*e*), oppose most vehemently any attempt to divide the business of the

Cullen, Montagu, and Whitmarsh. The new act has already given rise to three more; one by Mr. Eden, which may be relied upon for concise and accurate statements of the old law, but must be distrusted when speculating on the effects or the interpretation of the new; one by Mr. Archbold, which is portable; the third by Mr. Warrand, the form and arrangement of which is ingenious, and likely to be useful to the class for which it is obviously intended. The state of the law, however, is too uncertain to allow of our expecting any perfect treatise at present. This last act has also been already edited, and indexed by Messrs. Fonblanque, Gregg, Impey, Montagu, and others; a sufficient proof in it-

self of the importance and popular interest of the subject.

(*d*) But since the retirement of Mr. Cooke, and the death of Mr. Cullen, there has been no king's counsel pre-eminently distinguished in this department. These vacancies should be filled.

(*e*) It is said that the project for improving and throwing open the Exchequer is opposed by some who fear that if that Court were rendered efficient, it might operate in diminution of their monopoly of briefs in Chancery. We hope the accusation is ill founded; but, if we find the charge to be true, we shall feel it our duty to expose the nature of the individual interests which oppose themselves to the public good.

Courts into some more rational and convenient order. We have noted this point the more particularly, as we find in the Chancery Report a proposition, unquestionably right in the abstract; but which (under the existing system) would have no other effect than to destroy this incipient class of bankruptcy lawyers. It is of great use to the commercial world that they should know at once on what opinions they may rely for their guidance, and on what persons they can depend for certain and immediate assistance when subjected either as parties or witnesses to the summary jurisdiction of bankruptcy; this they can do if there be a known class devoted to that particular branch of study and practice; they are deprived of the advantage, if on an emergency they are obliged to search the whole ranks of the profession for assistance.

Within the last ten or twelve years more than usual attention has been paid to this branch of law; partly from its increased importance as respecting the extended scale and more complicated nature of our trade; and partly from the spirit of inquiry, which, though repressed for a time, then began to exercise itself on our legal institutions. Several attempts accordingly were from time to time made to reform the law, but it was not till about 1823-4 when the subject was undertaken by Mr. Eden, under the auspices (as it is said) of the Lord Chancellor (f), that any important progress was made.

(f) Mr. Cullen in commenting on the first attempt at consolidation, says, "The above bill was recently introduced into the House of Lords by the Lord Chancellor; but although so graced in its introduction, it is by no means to be considered as a bill proceeding from himself, or as the result of his own opinions or views with respect to the existing system of the bankrupt law. Had his other engagements permitted him to apply his great understanding, with his vast knowledge and experience, to such a subject, we should certainly have seen a bill of a very different kind;—a bill founded upon a large and comprehensive view of the policy or impolicy of the system generally, with such alterations proposed as would meet the evils of the present system in their causes; instead of a bill such as the one now under consideration, which appears to me to consist very much of a number of small points, a string of clauses having little or no general connecting

principle, and merely calculated to meet certain particular, and, in some instances, not very considerable inconveniences felt under the existing laws."

"But if we are to proceed thus only by detail, and to have a bill for each particular inconvenience or mischief that any witness may be able to point out, with the most convincing particularity of narrative of how it occurred to himself in his own individual experience, we may go on to have an endless succession of occasional and partial bills; instead of some general measure founded upon a comprehensive view of the origin and cause of all such mischiefs together; and which might put an end at once, not only to those mischiefs themselves, but to a not much less mischief in matters so deeply affecting all persons connected with trade; namely, that of a constant mending and altering of particular parts, so that it becomes almost impossible to know either what the

It was then for the first time that the previously abused theory of consolidation was applied to bankruptcy; with so little success, however, in the first instance, that the act of the 5th G. 4, was repealed in the middle of the day on which the principal part of its enactments came into operation (g) by the stat. 6 G. 4, c. 16, which is now in force.

As the first section of this act repeals no less than twenty-one previously existing statutes, a very important advantage has been gained; commercial men may now find within a moderate compass the enactments which principally concern them, and as far as common sense can be a guide to an act of parliament, they may learn something of the state of the law by which their daily transactions are, or ought to be, regulated; they may, if they are so inclined, ascertain the defects of the system, and suggest the amendments necessary to its improvement: we say, if they are so inclined: a doubt on this point may seem extraordinary; inclination and interest are generally found in conjunction, and it is only by very urgent reason that they can be separated; and yet it is evident that the trading classes have been most peculiarly supine on the subject of the Bankrupt Laws; they have submitted for ages, and almost in silence, to an inconvenient, absurd, and expensive system. Individuals, indeed, may from time to time have complained of hardships, or suggested amendment; but, as a body, the merchants of England have done nothing towards drawing the atten-

law would be at, or what the law is."—(*A Short Review of a Bill,* &c. &c.)

Mr. Eden about the same time published a pamphlet in vindication of his bill, Mr. Montagu another, containing many doubts upon its policy, and Mr. J. Fonblanque another, suggesting many alterations in the construction and practice of the Court of Commissioners. It is probable that each of these works had its merit; we shall take the shorter course of pointing out their general defects. Mr. Eden, with a parental affection, is too partial to his own work. Mr. Montagu, continually repeating his own opinions, and the opinions of others, as to the defects of the system, seldom if ever ventures to propose a remedy of his own, though his practical experience might be expected to have suggested one. His younger colleague falls into the opposite error, and is lavish

of suggestion without fully appreciating the difficulty of change.

(g) It is a singular fact that the favourite clauses of this act (those relating to certificates), which were brought into immediate operation, while the bulk of the statute was only to have effect on a distant day, were the principal causes of its premature dissolution. The most obnoxious enactment, that of sect. 116, was well known to have been intended to meet the hardship, or supposed hardship, of an individual case; but it was no sooner attempted to put the clause in operation, than it was discovered that no judge could apply the principle upon which it was supposed to have been founded. This bill, therefore, furnished an excellent example of the evil pointed out by Mr. Cullen in the too prevalent practice of legislating for particular grievances, without reference to general principles.

tion of the legislature or the public to the defective state of the law. There are not wanting persons who will urge this passive acquiescence as an argument against reform, and not without some semblance of reason; but they do not remember that submission to an abuse arises as often from despair of a remedy as from insensibility to the evil. What reasonable hope could any body of men entertain of a reform of the law while so many predominant interests and so many long existing prejudices were arrayed against them, when reform and disaffection, amendment and revolution were used as synonyms by all whose pockets, passions, or politics, ranked them as the champions of an antiquated system? The time, however, is fortunately arrived when prejudice is beginning to give way before the force of public opinion, and when even self-interest begins to examine the ground on which it stands, and inquires, whether a prudent change of position may not prevent a final overthrow; ministers of state admit the defects of our legislation, and even lawyers are found ready to assist in its amendment.

Another and most important cause of this apparent supineness of the trading interests, arises from the curious fact that the commercial class in this most commercial country, has no recognised organ (*h*) of communication with the legislature. Individuals, or individual corporations may petition; classes, as ship-owners, stock-brokers, silk-manufacturers, or sugar-bakers, when they find their several interests endangered, may represent their grievances to the ministry, or to the parliament; but there is no recognised officer who has a right to say in petition or remonstrance, "I represent the trading interests of Great Britain." Even the Corporation of the City of London, which may fairly be supposed to approach nearest to the nature of such a representative, has been recently accused of an officious, if not impertinent, interference with the legal authorities, for having appointed a committee to inquire into the state and execution of the Bankrupt Laws; and it is more than probable that the city petition, founded on the report of that committee, may be received with some coldness.

It happens, however, very fortunately for the object of these petitioners that the subject is one which cannot be avoided. The Chancery Report cannot be discussed without entering very largely into the subject of bankruptcy; for, although we are inclined to be of opinion, that the supposed pressure of bankrupt petitions upon the Court has been greatly exaggerated; yet, as the Chancery

(*h*) The Board of Trade might be supposed to exercise this function, if it were not obvious that its labours, however useful in other respects, have seldom, if ever, been directed to the reform of mere legal abuses or inconveniences, where they have not affected the revenue.

Commissioners themselves have adopted and acted upon that popular opinion, those who are to support the report cannot well contradict it.

Greatly as we advocate frequent discussion on the subject of all our judicial establishments, and especially of those in which the greatest abuses and inconveniences prevail, as we fear is the case in the practical administration of the Bankrupt Law; yet, we cannot but deprecate one of the forms in which this question is likely to be discussed, (and probably will have been discussed before this paper meets the public eye). We allude to the motion of which Mr. Michael Angelo Taylor has given notice. "That the jurisdiction of bankruptcy should be entirely taken from the Lord Chancellor." We object to this form, first, because by mixing something of personality, or, at any rate, by exciting the suspicion of personality in the discussion, the general question is likely to be prejudiced; and, secondly, because we very sincerely believe, and in this belief we find ourselves confirmed by the concurrent opinions of all who are most conversant with the subject, that the control of the proceedings in bankruptcy, and the final appeal on subjects growing out of them, ought to remain with the highest judicial authority. We do not mean to assert that the interposition of the Lord Chancellor is absolutely necessary in one-third of the interlocutory matters in which it is now exercised; these might be safely confided, in the first instance at least, to the Commissioners even as now constituted in London; but it is most material that the Commissioners, or any new tribunal which may be substituted for them, should feel that they are acting under the control of the highest legal power: it is equally important that the suitor should feel a confidence in the superiority of the judgment to which his interests are ultimately to be submitted. The jurisdiction of bankruptcy is not, and cannot be, in ordinary cases subject to appeal in the House of Lords;—being deprived of this last resort, it is certainly both just and expedient, that the suitor should have the next best remedy against error, the revision of the Lord Chancellor.

But though the wording of Mr. M. A. Taylor's motion, as we have understood it, goes to the jurisdiction of the Chancellor in bankruptcy, another object is most probably contained in it, the separation of the ministerial office of issuing commissions of bankruptcy from the judicial office of deciding on bankrupt petitions. On this point we should agree with the mover. The present form of a separate commission for each bankruptcy is utterly useless, except to the patentee (Lord Thurlow), and other officers who derive fees from it; for it must be quite obvious to every mind unfettered by self-interest, that it would be as easy to adjudicate in all bankruptcies under one commission, as it is to adjudicate in

all insolvencies under a single authority. Time (i) and expense may both be saved by the abolition of this form; a petitioning creditor should be empowered to go immediately before the Court which is to adjudicate the bankruptcy of his debtor; instead of being danced, by himself or his attorney, from office to office, to obtain that which might be granted him at once by a single well constituted tribunal.

Many obstacles would no doubt be thrown in the way of this reform; the treasury might shrink from the amount of compensations necessary to remunerate the persons who would be directly injured by the change; and those who, in the ordinary course of succession, might have fairly hoped for similar employment would naturally oppose an alteration which so materially affected their prospects. We cannot deny the justice of these claims, and are convinced, that the first and most necessary step towards legal reform is to quiet the apprehensions of those who must be injured by it. It is not just to obtain even a public benefit by the unnecessary infliction of private injury; it is not expedient to array self-interest against reform, when you can purchase its co-operation. Therefore while we assert the right of the working officers to compensation, we are, unwillingly indeed, compelled to admit the sinecurist to a participation of its benefits. Bad as all useless offices, burthening the administration of justice, must be, that of the patentee of commissions of bankrupt is the very worst:—we can scarcely conceive any thing more nefarious than the invention of a sinecure to be paid out of the wreck of an insolvent estate; and if Lord Thurlow, or Lord Thurlow's uncle, had been the inventor of the office, we should never have advocated compensation for its abolition; but as the evil is of no new creation, we are willing to conciliate even this interest, by showing that, by a temporary continuance of the sacrifice, the public may ultimately, and indeed at no very distant period, be exonerated from its burthen.

(i) During the long vacation, the loss of time is most material, as every commission must be taken into the country to have the Great Seal affixed to it; the extra expense of this journey is about two guineas; but if a petitioning creditor requires his commission in great haste (as may often be the case), and cannot wait till the ordinary journey of the officer, he must pay the whole travelling expenses or lose his remedy. The present Chancellor's country residence is in Dorsetshire, a future Chancellor may reside in

Northumberland; the present Chancellor has felt the importance of this branch of jurisdiction, and by the abolition of holidays, and other regulations has, at his own expense, given every facility, consistent with the existing system, to the speedy issuing of commissions; a future Chancellor may not be equally considerate or equally accessible. It is, therefore, expedient to render the execution of the law in this respect independent of all possible changes of Judges.

It has been proposed, that all fees and charges now payable in bankruptcy shall continue to be paid during the lives of those interested, whether in possession or reversion, in the continuance of the charges.—In the term reversion, we suppose is contained succession to office in the fair and ordinary course of promotion : reversions, in the common acceptation of the term, must now be rare ; as the resolution of the House of Commons on that head must be supposed to have put an end to that expensive, prodigal, and too often profligate practice.

Useless expense, however, is not the only or most important objection to the existing practice of issuing a separate commission for each bankruptcy : an abuse has arisen out of the employment of these instruments scarcely to be credited by those who do not know how often the forms of the law are used to defeat its justice. The summary jurisdiction of the Chancellor in bankruptcy was instituted by the legislature, in order that every creditor of an insolvent trader should, with the least possible delay, receive a rateable portion of the bankrupt's effects ; and the whole policy of the law runs most strongly, and in some cases almost unjustly, against any single creditor's receiving any benefit or preference above the rest of his fellow sufferers. Yet the very form, which was devised for the accomplishment of this purpose, has been made the instrument of the very fraud which it was intended to prevent ; and that, not in one or two solitary instances, not in occasional abuses of the law ; but in a systematic perversion of its authority. It is said, indeed, that more commissions are sued out for intimidation, and in order to force a payment or composition of the petitioning creditor's debt, than for the ostensible and legal object of dividing the estate among all who are entitled to it. There may be some exaggeration in this statement ; but if one-tenth part of it be true, the evil is of sufficient magnitude to demand immediate remedy. Under the present practice the solicitor of the petitioning creditor, under the fiction of being Clerk to the commission, has the custody of the instrument, which he may produce or not to the Commissioners named in it, as may best suit the individual purposes of his client : the Commissioners have no power over him, for they do not even know that the commission has issued ; and if they did know it, they have no authority to compel its production. In the mean time the petitioning creditor may be making his private bargain with the presumed bankrupt ; in doing which he may be perfectly at his ease for the space of fourteen days in London, or twenty-eight days in the country—no one can interfere with him, the field is all his own : if another creditor be also pressing for his demand, he can say to him, " If you do not desist I will open my commission, if you receive your money, I will over-reach you by relation to a previous act of bank-

ruptcy and make you refund it." At the end of the fourteen or twenty-eight days, if the first creditor has not made good use of his time, another, who is ready, may take his turn for a similar period; and if two creditors are in league and vigilant in taking out alternate commissions, they may keep up the ball for an indeterminate length of time; and that, whether their object is to secure themselves, or to defend the insolvent; for while this course is pursued no other creditor can obtain a commission. We have not space to enumerate the various purposes to which this abuse may be applied: suffice it to say, that we are not speculating on possible cases; we are pointing out for public attention evils which occur every day,—evils well known in their effect, the causes and machinery of which we feel it our duty to expose. We have indeed heard it said that such discussions are dangerous, and suggest knaveries to those who otherwise would not have thought of them; or even if they had contemplated them, might have been at a loss for the means of carrying their designs into execution. We entertain a contrary opinion, believing that every exposure of an abuse, if not a step towards its cure, tends to prevent the extension of its evil: those who hold a contrary doctrine would, as we believe, have been better employed in the abolition of the evils and inconveniences of the law, than in deprecating their exposure, or depreciating the motives of their detectors.

We have stated the disadvantage of having distinct commissions for each bankruptcy: for one of the evils, the facility which this instrument gives to fraudulent preferences, the legislature is supposed to have provided a remedy, and the Lord Chancellor has over and over again declared that, to sue out a commission of bankrupt for any other than the legal purpose of division of property among the creditors is a high contempt of the Great Seal. And though the statute provides that every petitioning creditor shall enter into a bond to the Lord Chancellor in the penal sum of 200*l.*, conditioned, among other things, "to proceed on such commission," and in another section provides that a petitioning creditor compounding his debt after he has struck a docket, "shall forfeit his whole debt, and also repay or deliver up such money, gift, delivery, satisfaction, or security, as aforesaid, or the full value thereof, to such person or persons as the Commissioners, acting under such original commission (?), or any new commission, shall appoint for the benefit of the creditors of such bankrupt;" yet, in spite of the denunciation of the Lord Chancellor, the penalty of the bond, and the forfeiture under the statute, we have scarcely heard of a commitment for the contempt, an assignment of the bond, or a recovery under the Act of Parliament; and this, not because the offence is rare, but be-

cause the supposed remedies are ineffective, detection prevented or opposed by the forms of office, and appeal to the Great Seal by the *festinum remedium* of a petition in bankruptcy, so dilatory, expensive, and uncertain, that a wise creditor will rather put up with the loss of his money than incur further risk by seeking redress.

The abolition of distinct commissions, which we have before recommended on the score of economy, would remedy this abuse also; but if the present form of commission is to be continued, the most simple mode of abating, if not abolishing, the evil would be to deliver the commission at once to the Commissioners named in it, and who have an interest in its prosecution (*k*), and not to the solicitor (*l*), who may have a purpose to serve in its suppression.

With this proviso, therefore (indemnity to displaced officers), the public will have the advantage of a gradual but certain abolition of the useless charges to which commissions are now subject; and the displaced officers may be allowed pensions equal or nearly equal to their existing emoluments. We say displaced officers, because we are convinced that the offices should be at once abolished: a recent instance, connected with the Court of Exchequer, has convinced us that the promised extinction of a sinecure, after the death of the then existing holder, is but an indifferent security to the public; but if the office be at once abolished, the revival of the salary would be a matter of greater difficulty.

The great, and by far most important point, to be discussed in the present session appears to be, whether the execution of the Bankrupt Laws shall continue to be confided to occasional Commissioners, or whether a permanent tribunal shall be created for their administration. Until this question be decided, no very great improvement can be anticipated in the detail of this branch of judicature: our legislature has unfortunately fallen into the error of adapting the law to the tribunal which is to execute it, instead of amending the tribunals to meet the improvements of the law. The question with them is not—is the law right or

(*k*) An interest which we are far from defending, though in the present instance it may be useful. One of the strongest arguments against the constitution of the existing Court of Commissioners, and their payment by fees is, that they may be, or may be suspected to be, influenced in adjudication by their personal interests.

(*l*) It is said that a person, not an attorney or solicitor, may sue out a commission of bankrupt. (Query then, who is to be clerk to the commission?) If so, the evil here complained of may be yet greater; for the Court has some little control over its officers, which it cannot exercise over strangers.

wrong? But, how can the Court, the judge, or the officer deal with it; and if the intended amendment be found inconvenient to the Court, the judge, or the officer, it is rejected. If our mechanics had proceeded on this absurd principle, our manufactures would never have attained their existing pre-eminence:—with them the question is, “Will the old machine execute this new fabric?” “No.” “Then build me a new one.” “Will it do this?” “Yes, with a little alteration.” “Will that alteration spoil it for the old purposes?” “Oh, no, I’ll put in a crank here, and then it will work both patterns; but then, if you’ve constant work on the old pattern, you’d better have a new engine at once, it’ll be cheapest in the end.” This is the way they reason at Birmingham, Sheffield, and Manchester; not so in the Commons, the Peers, and the Cabinet: there the old machines are the objects to be preserved, the work to be done is a subject of secondary importance. Thus we have exactly the same number of principal courts, exactly the same number of judges for the twelve millions of people, fifty millions of revenue, and twenty-eight volumes of statutes at large of 1827 (*m*), that we had for the scanty population, insignificant resources, and concise legislation of 1272 (1 Ed. 1): we have put law books out of the comparison; no bibliopolist, no bibliologist, can give us any commensurate idea of their present number.

But, though the principal public and really responsible courts have remained nearly the same for so many centuries, a number of petty, and almost private, jurisdictions have been created to dispose of the surplus business of the country; among these are commissions and commissioners for various purposes, beginning with the commission of the peace, ending we scarcely know where. It will probably be our duty to expose the defects of all these occasional jurisdictions, and to show that, in the present state of the country, permanent tribunals should be substituted for them: our present business is with the Commissioners of Bankrupt; but, in pursuing it, we must, from time to time, remind our readers that concurrent reforms are most likely to be effective; the same change which is desired in bankruptcy is equally applicable to other branches of judicature; if new tribunals are erected for the administration of the one, they may at once be adapted to the execution of the others: if a local court is to be established at

(*m*) Of these, four volumes contain the wisdom of our ancestors, from Magna Charta to the accession of the House of Hanover; the statutes from 1 Geo. 1 to 7 Geo. 4 oc-

cupy the remaining twenty-four, of which ten are subsequent to the Union. Is it not time to condense our legislation?

York for the administration of the Bankrupt Laws,—the same court may have the jurisdiction over lunacy, and its officers may take examinations, answers, and affidavits, execute commissions of inquiry, ascertain boundaries, and perform many other duties in aid of our principal courts, which are now confided to temporary, inefficient, and almost irresponsible authorities. That bankruptcy and insolvency should have been subjected to the jurisdiction of distinct courts is a solecism in legislation which can only be accounted for by the repugnance which parliament has (till lately) shown to viewing the whole of a legal subject together—piece-meal enactment was the great evil of the last age; let us hope that general views are become the fashion of the present.

The first step taken should be to unite these branches of bankruptcy and insolvency, which have been so unwisely separated; *mutatis mutandis*, traders and non-traders should be subject to one jurisdiction. This union will also be attended with some benefit, as it will bring in a very considerable sum towards the erection of more perfect and comprehensive tribunals. We have seen one plan, in which it is proposed to add a jurisdiction for the recovery of small debts to the other functions of such new courts: on this subject we confess that we entertain some doubts; the merit of a small debt court should be, that every man throughout the country should be able to obtain justice at little trouble and less expense. This object cannot be obtained by establishing any moderate number of fixed tribunals: even one to each county would not be sufficient in many instances; nor can it be attained by circuits—the practice of judges itinerant is too apt to partake of their character of travellers, they are ever in haste to be gone, and the remanets which they leave behind them are too generally the most important and expensive causes which they had to try. The remaining question is, whether the object can be effected by an union of these projects, that is, by local or provincial courts, occasionally becoming itinerant,—we rather think that it can. There can be no greater difficulty in allowing judges, whose general place of judicature is Bristol, to make occasional excursions to Exeter or Gloucester than in sending the twelve judges of Westminster-hall to all parts of the kingdom; the principle is the same in both cases, creating new centres and circumscribing their circuits is all that is necessary for its practical application.

We must not, however, deny that many and obvious objections may be raised to provincial tribunals; we admit that such courts are liable to the imputation of personal interests and local prejudices; we know that they cannot emulate the dignity, or comprise the learning of the superior jurisdictions. There is a danger too that the uniformity of the law, in principal and practice, may be

impaired by their independence of each other. (n) The absence of the more regular bar is another and most important objection. (o) But giving to every one of these, and to as many more as may be urged, their full weight; and even admitting, which we do not, that these assigned evils are without remedy; let it be remembered that, by the creation of a very limited number of provincial courts, we propose to consolidate an infinite variety of petty jurisdictions, all of which are liable to the same imputations, and in a higher degree proportioned to their minuteness and obscurity. Consolidation and publicity may not absolutely cure all the existing evils; but they will certainly diminish the greater part of them. A very simple remedy may also be applied to that objection on which we are inclined to lay the greatest stress, local prejudices and partialities. Let no man act as a judge in his own county, nor even in the circuit in which his own county is contained; (p) and remove the principal judges, from court to court, once, at least, in every three years. This measure will also secure uniformity of decision, and will keep the minds of the judges upon the alert, that they may not, on comparison with their colleagues, successors, or predecessors, be found defective.

With proper precaution, therefore, as we believe, the consolidation of existing minor jurisdictions into a few provincial courts will afford the best and easiest remedy for the evils and abuses now complained of in bankruptcy, and equally imputable to other branches of the law, though their comparative minuteness has, for the present, defended them from public discussion. (q)

It is scarcely possible to conceive a system more absurd in principle, or more mischievous in practice, than that which now prevails in respect of commissions of bankruptcy, to be executed in the country, where the party suing out the process has the choice of the judges, and that too, not from any known and limited number of competent persons, but from all the attorneys and barristers of his neighbourhood. The observations of the

(n) One of the most beneficial results of the established system of circuits is the security which it gives to the uniformity of the law; but this effect is already in some danger, since it has become the custom for judges year after year to choose the same districts.

(o) But this inconvenience would very shortly be remedied, as the character of the provincial bar would be materially improved by the existence of permanent courts, and more constant and regular practice. All that

this class might lose by the abolition of commissions would be made up to them by the increase of general business.

(p) Except in or about London, where local affection, if it exist at all, is too much diffused to be mischievous.

(q) The resolutions of the Chancery Commissioners, as to examiners for taking evidence in the country, may serve to elucidate this subject. See *Chan. Rep. Prop.* 47, 48.

Lord Chancellor, reported in 6 Ves. p. 1., have been so often quoted, that apology might almost be expected for repeating them, if it were not, that the opinion of this cautious and experienced judge may in itself serve as an answer to those obstinate enemies of reform on whom other argument would probably be thrown away. "His Lordship observed with warmth, that the abuse of the Bankrupt Law is a disgrace to the country, and it would be better at once to repeal all the statutes than to suffer them to be applied to such purposes; there is no mercy to the estate; nothing is less thought of than the objects of the commission. As they are frequently conducted *in the country*, they are little more than stock in trade for the Commissioners, the assignees, and solicitor; instead of solicitors attending to their duty as ministers of the court, for they are so, Commissions of bankruptcy are treated as matters of traffic: A taking up the commission, B and C act as Commissioners (r). They are consi-

(r) Preposterous as this system must appear to all reasonable and impartial minds, it has recently found an advocate, and that, too, in a work, the general tenor of which would have induced us to expect more liberal views. A writer in the Parliamentary Review says, "In London, commissions are in some respects worse executed than any where else, and the prevailing abuses originating in circumstances supposed to be unavoidable, have been allowed to continue as component parts of the system." From this opening we certainly expected some fearful exposure of enormous malversations; the only evil cited, however, is that many (now restricted to three) meetings being held at one hour, the business is transacted "in a tumultuous and inefficient manner, if at all;" this, "if at all," needs no answer, and the charge of inefficiency is refuted by the paucity of appeals against the judgment of London Commissioners; that the meetings are often tumultuous we admit: angry creditors would not easily be kept in order even by a more dignified tribunal, nor do we believe that the meetings of country commissioners in the back parlour of the Goose and Gridiron are more solemn or decorous. And we are even inclined to doubt

whether the decent solemnity so much desired would counterbalance the advantages of a less dignified meeting; a plain man, who would shrink from the form of making a set speech to a regular court, can now tell his story to the Commissioners, or discuss his claim with the assignees or bankrupt; and those who are conversant with this branch of business must have observed that truths, which in all probability would have escaped the most rigorous and formal examination, are elicited from parties thrown off their guard in the heat of argument. That three meetings should be held at one time is an evil, however slight: it would, no doubt, be more satisfactory to the Commissioners to have each matter separately called on, and when no more creditors presented themselves in one bankruptcy to proceed to the next; but we very much doubt whether the creditors, who might be a minute too late, or who would have to wait their turn, to the delay of more lucrative business, would relish this arrangement. To require Commissioners to sit a full hour on each case, whether there were much or little or nothing to do under it, would be unreasonable, and ultimately prejudicial; for men properly qualified would not be found willing to act on

dered as stock in trade; and calculations are made how many commissions can be brought into the partnership; and unless the

such terms. In the country, indeed, where a barrister receives two or three pounds a sitting, and makes two or three adjournments in the same day, he may, not having other business to attend, afford to sacrifice his time for two, six, or nine pounds a day; but in London, where the regulated fee is one pound for each meeting, and the fiction of adjournment is never resorted to, however long the sitting may be, it is impossible.

The remedy which the Parliamentary Reviewer proposes for this evil is as extraordinary as the reasoning by which he attempts to support it:—"If the permanent lists of commissioners were set aside, the practice originally followed, and which still prevails in country commissions, might be revived; according to which every person taking out a commission names the Commissioners, subject to the approbation of the Lord Chancellor" (who knows nothing about them); and bankruptcy business would thus be thrown open to the legal profession at large, subject to the provision by which one at least of the acting Commissioners must be a barrister. The arguments in favour of this change are, that there would always be a full set of Commissioners for the administration of each commission, while there would remain no pretence for negligence or irregularity. This of itself would be a great point gained. Another advantage would be, that success in the practice of bankruptcy, as in other branches of the profession, would be the reward of talents, experience, and business-like habits. The most worthy in these respects, "*subject to the disturbing powers (if the expression may be allowed), of connexion and other incidental circumstances,*" (!!!) "*which can never fail to operate,*" will become the most distinguished and influential. The

stimulus thus excited may reasonably be expected to produce a gradual improvement in the bankrupt law; and that "*diversity and incongruity in practice which has sprung from the existence of numerous little jurisdictions of equal authority, acting independently of each other, would cease.*" How the diversity and incongruity arising from a number of little jurisdictions can be remedied by creating an infinitely greater number of still smaller jurisdictions passes our comprehension: nor can we discover how "the rules of practice would be derived from one source, and order and regularity be the consequence of allowing every attorney to create his own court. Let us not be understood to pass any indiscriminate censure on a large class of men for many of whom we entertain a high opinion, when we say that the conduct of solicitors to Commissions of Bankrupts requires the strictest vigilance, and that, instead of adopting any measure which might relax the superintending power of the Commissioners, those powers rather require increase, even to the extent of enabling them to suspend from practice in their court those persons who may be found unworthy of the trust of holding proceedings; for it is well known that a very considerable number of the least respectable class of the profession principally subsist by the abuses of the Bankrupt Laws.

The late case of the King against Haselden will elucidate this point; but we greatly doubt whether that example will effect the dispersion of the gangs of fictitious creditors who haunt the Court of Commissioners; and who, though sometimes detected by single lists, still take their chance of the other thirteen. Many months have not elapsed since we saw an attorney sitting at one of the tables, in the character of solicitor to one commission, he himself being the

Court holds a strong hand over a bankruptcy, particularly as administered in the country, it is itself accessory to as great a

bankrupt under another, worked before the same list, at the same place and hour.

It will be seen that we do not advocate the existing system in town or country, but we may fairly oppose the opinion of a committee of the House of Commons to this censure of the Parliamentary Review. The report of 1817 states that no instance of misconduct, on the part of London commissioners, has come to the knowledge of the committee; while, on the other hand, it states, that "the abuses existing under these (country) commissions, the great waste of expense, and the little benefit derived by the creditors, are notorious;" and goes on to recommend either that *permanent* lists should be formed in the country, or that, as the least expensive course, all commissions should be executed in London. Mr. Spurrier, a witness examined by this committee, whose experience had been of country commissions in their least objectionable state (at Birmingham we believe) acknowledges that "it is well known that Commissioners are

sometimes appointed by the solicitor himself, not because they are the fittest persons, but because they are most likely to suit the solicitor's or the bankrupt's purposes." If this argument had its weight with the committee in 1817, how much stronger would their opinion be now, when voluntary bankruptcy, and the taxation of costs by Commissioners, must have induced additional cause of caution. A man may now make himself bankrupt, and appoint the judges, by whom his conduct is to be investigated! Country attorneys may now say to each other, not only, "make me your commissioner, and I will make you mine;" but may add, "tax my costs * as you wish your own to be taxed,"—a golden rule not likely to be neglected. The Parliamentary Reviewer must cite some greater abuse than the tumultuous meetings of the Court of Commissioners (of inefficiency he gives no example) before he persuades the legislature to return to a system, which he allows to be subject to the disturbing powers of *connexion*, and other incidental circumstances.

* We have now before us a bill of costs under a country commission, which will elucidate this point. The whole amount is 216*l.* 5*s.* 2*d.* though it is sworn that the business done under the commission did not exceed the ordinary quantity. Among the charges we find:

	£	s.	d.
To Commissioners' fees, on eleven days, four Commissioners being paid for each meeting instead of three, and more than one meeting being held on the same day	91	0	0
To quorum Commissioner's expenses	72	19	6
To dinners for Commissioners	143	9	8
Creditors	3	1	0
To Solicitor's fees for attendance at meetings	28	10	0
preparing depositions	70	7	0
Clerks attendance at meetings	2	13	4

We do not insert all the objectionable items in this account, the amount of which the Solicitor was allowed to retain from Sept. 1814 to Dec. 1825, when a petition was presented to have it taxed by a Master. In support of this petition it was also sworn, that the quorum Commissioner was attending other meetings under other Commissions at the same time. We are convinced, indeed, that this practice (palpably objectionable, but almost necessarily incident to the system) exists as generally at Bristol, Birmingham, Liverpool, Manchester, Norwich, and other great commercial or manufacturing towns, as it does in London.

nuisance as any known in the land, and known to pass under the forms of its law." (s)

That the system should have survived this exposure must be a subject of astonishment, and can only be attributed to that excessive jealousy of change, however minute, which for many years characterised the politics of the predominant party in Parliament.

The check (for in this matter, as in most others, the absurd or abused doctrine of checks and balances is interposed) is as futile as the general practice is indefensible: two of the Commissioners must be barristers, if there be barristers in the neighbourhood who are willing to act for the usual fees, and that they may be willing to act, the last statute gives them some additional inducements; but there is not one word of qualification in the rule, the barrister may be twenty-one years of age and of three days' standing, or he may be an octaginarian who has never held a brief even at sessions. (t)

(s) The case of *ex parte Story*, Buck. 70, furnishes another instance of the danger of allowing parties to choose their own Commissioners. Linskill, Holland, Fenwick, and Cockerell were partners as ship-owners; Fenwick and Cockerell were both solicitors. Linskill sued out a commission of bankrupt against Story, a debtor to the four. Cockerell was the solicitor or clerk to this commission, Fenwick one of the commissioners, and Holland assignee. Sir Samuel Romilly, in support of the commission, stated, "That, in the country at a distance from London, the being a creditor was not generally known to disqualify a man from acting as a Commissioner." The Chancellor has since made a general order on this subject; but, while an attorney, who is concerned for creditors, may sit on a commission, the evil, though mitigated, is unabated.

Not many months have elapsed since a case was brought before the Court, in which one of the commissioners, an attorney, made a bargain with the solicitor to the commission, that he, the clerk, should take the commissioner's fees, and give him, in exchange, the profits of *working*

the commission. Under the new act this commissioner would have to tax the Bill of Costs, of which he himself would receive the amount! We have heard of a young provincial barrister, who, having taxed a bill, at the second meeting, somewhat more rigorously than country attorneys deem just, was never again named as a commissioner.

(t) This absurdity prevails in many other departments where it has been provided by statute that certain officers should be barristers of ——— years standing. Of late, some little improvement has been made by adding the words "actually practising at the bar;" but this is still too vague when it is considered that a call to the bar is a mere matter of form, the student is not obliged to pursue any course of study, he undergoes no examination; but after standing a fixed number of years on the Society's books, eating, or pretending to eat, a certain number of dinners, making (at Lincoln's Inn) a regulated number of bows to the bar-table, and paying his dues and fees, he is admitted to take the oaths of allegiance, supremacy, and abjuration, and becomes a counsellor learned in the law! There is no great

The objections which may be made to a tribunal so constituted, ignorance, incapacity, local interests, favor and affection, prejudice, and sometimes malice, to say nothing of jobbing and cupidity, are so obvious, that we need not dwell on the weakest part of the system; and would therefore rather rest our arguments on the general defects of the jurisdiction, as exercised in London by regular and permanent Commissioners, and leave the deduction *à fortiori* to our readers, than appear to cast an invidious obloquy on country practitioners. In one point of view, however, it is essential to draw attention to this defect. When it is proposed to lighten the business of the Court of Chancery by transferring to the jurisdiction of the Commissioners certain matters which obviously should belong to them (in the first instance), as the removal of assignees, the allowance or recall of the certificate, and other similar subjects, the proposal is immediately met by the question, "Could you trust these things to country Commissioners? As now constituted, certainly not! These country Commissions therefore are the great obstacle to reform, and yet it happens most strangely that the Chancery Commissioners blinking the more serious evil, propose their remedy (*valeat quantum* !!) for London only. It is difficult to imagine the train of reasoning which could have led to such a conclusion; for the Chancery Commissioners must have known that the majority of petitions in the nature of appeal come from the country and not from London, and that taking both together, the appeals, properly so called, do not constitute one-twentieth part of the petitions annually presented. The mass of petitions are not from the judgments of the Commissioners; but are to enable the Commissioners to execute, or calling upon the Lord Chancellor to execute, various powers, which, from the notorious imperfection of the lower tribunal have been withheld from its jurisdiction, in the first instance, or have been entirely reserved for higher judgment; as in the case of an equitable mortgage, of which the Commissioners can take no account till the matter has been referred to them by the Court—the removal of assignees—the allowance or recall of the certificate, and many other points which might be safely entrusted to regularly constituted tribunals; but are prudently with-

harm in all this as far as clients are concerned, for the young gentleman will not get much business unless he deserves it, and his early blunders are generally corrected by his leaders; but it is otherwise when he is *uno flatu* called to the bar and promoted to the Bench (though it be only the Bench of the Quarter Sessions), or entrusted with the compli-

cated interests of trade, as a Commissioner of Bankrupt. The remedy for this evil is obviously with the Inns of Court; but whether they will consent to a sacrifice of their revenues to the interests and honour of their profession, is a question which, at present, we will not venture to moot.

held from the doubtful competence of Commissioners of Bankrupt. Create a better Court of first instance, and the difficulty vanishes; the Court of Chancery will be relieved from a mass of business, which is supposed to impede its progress; and the commercial interests will practically enjoy a cheap and expeditious jurisdiction, the *festinum remedium*, which the theory of the law allows to be necessary in bankruptcy.

Having, as we hope, proved the expediency of establishing permanent Courts for transacting the business of bankruptcy and insolvency, at the least; the question of expense remains to be considered. We shall not at present take into consideration the saving which we have proposed by the abolition of commissions as now issued; that saving, if effected must be gradual; but, taking the amount of fees now paid to Commissioners throughout England, leave it to the reader to determine whether that sum, together with the salaries of the existing Commissioners of the Insolvent Debtors Court, would not be sufficient to support an adequate number of provincial Tribunals. There are in London 70 Commissioners of Bankrupt, whose average receipts (the last year not included) are 300*l.* per annum, or 21,000*l.* for the whole—the number of country is nearly equal to the number of London commissions; but the expense is much greater, from the increased number of adjournments, and from the quorum Commissioners taking 2 and 3*l.* for each sitting instead of 1*l.*—Thus a meeting which costs 3*l.* in London for Commissioner's fees, must cost 4*l.* and may cost (if there be three barristers) 9*l.* in the country. We must, therefore, be much within the mark, if, for the sake of round numbers, we calculate the fees to country Commissioners at 29,000*l.* making in the whole for fees only 50,000*l.* a year, (*u*) an enormous sum,

(*u*) Mr. Montagu, in his Digest, No. 4, makes this expense only 42,000*l.*; but calculating the number of London and country Commissions as equal, he makes the cost of each in fees 21,000*l.* not adverting to the then double (and now sometimes treble) fee of the Quorum Commissioners, nor to the notorious number of adjournments. In other respects, however, he exceeds our estimate, making the annual cost of Commissions no less than 221,000*l.* without including the solicitor's bills (except for fees) for the conduct of the Commissions, or the necessary suits, petitions, or actions, arising out of them. His estimate is as follows:

Commissioners and Solicitor 56,000

Messengers.....	24,000 (!!!)
Increase of litigation from nature of the tribunal	24,000
Broker and accountant..	18,000
Losses from	
Non-seizure.....	} 60,000
Non-discovery	
Improvident sales..	
Expenses attendant upon assignees	21,700
Interest of money at bankers	24,000
Losses from failure of assignees, unclaimed dividends and undivided residues	14,400
	<hr/> 242,100
	<hr/> Say 221,000

enough to pay 25 regular Judges, at the rate of 2000*l.* a year. (v) Nor is this by any means the only sum which would be available for the support of a better system. By the appointment of an accountant general into whose hands all monies, now deposited with private bankers, should be paid, an immense sum would be annually saved in interest for the direct benefit of the estates, the risk of failures would be avoided, and unclaimed dividends (w) and undivided residues, instead of going into the pockets of individuals, would be applicable to the public purposes of the Court.

Thus we should have a sum amply sufficient, not only for the support of the new Courts; but also for compensation to those who are necessarily displaced from established offices: subject to these lives, and the provision of an adequate fund for future pensions (it is bad policy to retain superannuated Judges), a gradual saving may be made, in the general expenses of bankruptcy.

The last point to which we shall at present advert, and it is certainly one of considerable practical importance, and of some difficulty, is PATRONAGE; for while one party will not fail to deprecate the abolition of so many established offices, another will be equally violent in vociferation against the establishment of new places. Against the one it may be urged, that the amount to be disposed of under a new system will be greater than under the old, (x) though the number of persons among whom it is to be distributed will be less. Those who dread the increased influence of government must remember that the disposal of offices of considerable magnitude is subject to; and in a great measure controuled by, public opinion; while the patronage of petty places is free from such check—but if it were not so, we should still contend that no object of obvious utility ought to be opposed on this ground; it is of the idle sinecurist, not of the working officer, that the country should be jealous; with the one, place is the price of subserviency—with the other, it is the reward of labour. Therefore, though the influence of the Crown might be increased by the general extension of our judicial establishments, and the

(v) We consider 1500*l.* to be the minimum for which a barrister properly qualified would leave his practice, or hope of practice, at the bar.

(w) 6 G. 4, § 110, is all but useless for want of a clause similar to § 120. Since this article was written, we perceive that Mr. Alderman Wood has moved for a return of unclaimed dividends entered at the Bankrupt Office. Though we dislike piece-meal legislation generally, in this instance we should

recommend a short bill to amend the abovementioned section; because the amount of this fund may determine a main question as to pensions, compensations, and salaries.

(x) See the Report of the Committee of the House of Commons in 1817, from which it appears, that the Chancellor had declined increasing his patronage by appropriating to himself (as the Committee think he ought have done) the appointment of Commissioners in the country.

patronage of the Lord Chancellor would be swelled in amount, though reduced as to the number of persons among whom it must be distributed, by the proposed establishments of permanent judges in Bankruptcy; we shall deem these as minor considerations, when compared with the benefits which the people will derive from an improved administration of the law in those branches which more immediately concern their daily interests.

Since these observations were written his Honour the Master of the Rolls has brought in a Bill to carry into effect some of the Propositions of the Chancery Commissioners: we were not surprised to perceive that those relating to bankruptcy had been totally omitted, for they had scarcely been printed when it was as generally understood in the profession at large that they were abandoned, as it was obvious to those intimately acquainted with the subject, that, if adopted, they would prove inefficient. There is, however, one clause which virtually affects the Bankrupt Law; it is to be enacted—

“ That when and so often as it may appear expedient, in respect of the weight and pressure of the business depending in the High Court of Chancery, it shall and may be lawful for the Lord High Chancellor, upon any application made to him for a writ of *habeas corpus*, to award and grant such writ, and to order that the same be made returnable before any one of the Justices either of the Court of King’s Bench or the Court of Common Pleas at Westminster, or before any one of the Barons of the Court of Exchequer at Westminster; and the justice or baron before whom such writ shall be so made returnable shall proceed thereon in the same manner, and any order made thereon shall have the same force and effect as if such writ had, in the first instance, been granted by such justice or baron.”

Now it is well known that scarcely any writs of *habeas corpus* are brought before the Lord Chancellor, except in cases of bankruptcy, and that for the causes which the following case will exemplify.

“ IN THE MATTER OF ROBERTS, A BANKRUPT.

“ Mr. Horne said, he had a case of *Habeas Corpus* to bring before his Lordship, in the above matter, which was accompanied by a petition. The *Habeas Corpus* had not been moved for to bring up the bankrupt, but for the purpose of bringing up a young man of the name of White, a salesman at Manchester, who had been committed by the Commissioners for not satisfactorily answering certain questions put to him respecting the property and conduct of the bankrupt.

“ Mr. Rose objected to Mr. Horne’s bringing on the petition, which prayed nothing more or less than that the bankrupt should be discharged. The petition complained of the conduct of the commissioners, and he thought it ought not to be brought on till the commissioners had been served with a copy.

“ Mr. Horne said, he would not then open the petition, as his learned friend had objected to it, but he would confine himself to the commitment. The learned counsel then went through the whole of the examination, and

submitted that the answers given by Mr. White were perfectly satisfactory, and that he ought to be discharged.

"Mr. Rose, in support of the commitment, said, he should not think of going at length into the case, as his lordship must already be almost fatigued with hearing these matters. He, however, contended, that, upon the whole, the examination was very unsatisfactory, and that the answers were given for the purpose of deluding the commissioners, and protecting the bankrupt.

"The Lord Chancellor observed, that more writs of *Habeas Corpus* had come before this Court within the last week, than were brought before it during the whole three and twenty years that he practised at the bar. This was the state of things after the legislature had passed an act for the purpose of enabling every judge of the land to hear these matters.

"Mr. Horne having replied,

"The Lord Chancellor said, that, perhaps it was the natural tendency of his mind to discharge all persons committed in bankruptcy, which might have been the cause of misleading him in many cases; but, though he avowed it was his inclination to do so wherever he could, still, it did not appear to him that he could at present discharge this person. He should, however, state, that he thought it would be better for the commissioners to ask a few more questions of Mr. White, as he certainly should have done so, had he been one of them, and he should wish to be informed of what passed before the commissioners as soon as the examination should be closed.

"It was then arranged that the petition respecting the discharge of the bankrupt should stand over till the result of the further examination was known."

We shall have occasion, at no distant period, to advert at some length to the many disputed points which arise, as to commitments by Commissioners of Bankrupts; we shall at present content ourselves by referring our readers to an able publication on this subject, by Mr. Beames, in which all the cases and authorities are diligently collected; we do not, it is true, absolutely agree with this gentleman in the result of his reasoning; which, though it may be correct as to the present state of the law, appears to go too far in vindication of the established, but mischievous, fiction,

Nemo tenetur prodere seipsum.

The Lord Chancellor confesses the tendency of his mind to discharge all persons committed in bankruptcy: can his Lordship then be surprised, this tendency being notorious, that all prisoners bring their writs of *Habeas Corpus* before him, in preference to any other judge, and that more especially as he is well aware that, while a common law judge must confine himself to the consideration of the warrant only, he, on the other hand, may wander over the whole mass of proceedings in search of irregularities on which to found a discharge.

We have often heard his Lordship complain, that this branch

of business is thrown exclusively on him, and have wondered, that he has not discovered, or been honestly told, the very obvious reason. If Sir J. Copley desires to exonerate the Lord Chancellor from the burthen of this branch of business, he should enable the judge to proceed thereon in the same manner as the Chancellor would have done, that is to say, to look into the whole of the proceedings, and not to confine his judgement to the form of the warrant.

We cannot omit taking an early opportunity of vindicating the 14th List (from which the greater number of commitments come) from the undeserved obloquy which it is the fashion of the day to heap upon them. It is true that they have committed more prisoners than all the other lists put together: this should only give rise to the question, Whether the thirteen lists have neglected their duties, or the 14th exceeded theirs? We incline very much to the former supposition; for we feel it much more difficult to believe, that in fourteen years the 5th, 10th, 12th, and 13th, have never had a bankrupt or witness before them who has deserved commitment; or that the 1st and 11th have had only one each, than that forty-one legitimate cases (less than three a year) should have occurred to the 14th. There may be, and probably is, something of harshness in the *manner* in which this power is exercised; but seeing the frauds daily committed in bankruptcy, (y) examining the cases in which the warrants of this list have been discharged, for form rather than substance, we cannot but avow our opinion, that these Commissioners have suffered much unmerited reprehension for the fearless discharge of their duties.

(y) The last Middlesex Sessions afforded an example of the benefit resulting to the public from the strict examinations of this list. Arund Eden was convicted of perjury, in swearing to a debt or payment of 250*l.* upon a bill of the bankrupt's, given in 1821.

Several gentlemen from the Stamp Office swore, that the stamp on

which the bill was drawn was not in existence before 1826!

John Reis, the bankrupt, was also convicted of similar perjury.

A few more of these detections would be highly beneficial. It might be well to have a return of convictions for offences under the Bankrupt Laws, that the 14th List might have an opportunity of justifying their practice.

ART. V.—LEGISLATIVE MEASURES IN INDIA FOR RESTRAINING THE FREEDOM OF THE PRESS.

It was not until many years after the establishment of the East India Company in Hindostan, that British courts of justice were created at the several presidencies or seats of government—Calcutta, Madras, and Bombay. The avowed object of erecting such courts was to secure to all British subjects over whom their jurisdiction extended that protection of person and property which the British law affords to the inhabitants of the mother country: and by the administration of justice, according to the forms of the English courts, to keep a check upon the local governments.

One of the most important clauses of the charter by which these supreme courts of judicature were created, provided, that no regulation of the local government should be valid in law, unless it received the sanction of the court at the presidency at which it might be made; and this sanction could not be granted by the bench, unless the regulation should be, in the opinion of the judges, "just, reasonable, and not repugnant to the laws of the realm." (a) Other provisions were made, to give full publicity to such regulations, by suspending them for a certain period in the court before their registry could take place: and it was left open to

(a) The power, thus conferred upon the supreme courts, of controlling the authority of the local governments, will probably remind our readers of the similar powers possessed by the parliaments, or supreme provincial tribunals of France with respect to the "Ordonnances" of the king. The origin of this check upon the royal authority in France is involved in some obscurity. But whether it was the result of grant or usurpation, this much is certain, that from the 14th century no edict or ordinance could obtain the force of law until it had been verified and registered in the parliament of the province in which it was promulgated. "Les parlemens," says Meyer (*Institutions Judiciaires*, 3, 171,) "avoient même étendu le droit d'enregistrement à celui de vérifier, non la forme et l'authenticité des édits et des ordonnances, mais leur contenu; ils présentaient aux

rois des remontrances sur ce qu'ils croyaient ne pas convenir à la situation des provinces; ils mettaient des restrictions et des modifications à l'enregistrement; ils exerçaient de fait une espèce de censure sur le pouvoir législatif." The parliament of each province had the power of acting independently of the rest; and of determining whether the ordinance presented for registration was in accordance with the interests of the particular district over which it had jurisdiction; nor was it restricted to the alternative of simply registering or simply rejecting;—it might also modify the ordinance, so as to accommodate its provisions to the wants and peculiar circumstances of the province. "Il se pouvoit," observes Meyer, "que l'ordonnance fût enregistrée dans un parlement, modifiée dans un second, et rejetée par un troisième."

persons so disposed to oppose by counsel the registration of any regulation which they could show to be either unjust, inexpedient, or clearly repugnant to the laws of the realm.

Notwithstanding the power granted by statute to the governors of the several presidencies in India, to make any regulation they deemed advisable within the limits prescribed, it is remarkable, that no governor-general, from the earliest records of the India Company's history, up to the period of its last governor-general Lord Hastings' resignation in 1823, ever attempted to procure the registration of any regulation for infringing or abridging, in the slightest degree, the liberty of the press. It was enjoyed in every part of India in as full perfection as in England itself: and in every case of alleged libel, whether on the government or on individuals, no other mode of procedure for remedy was either suggested or pursued, but that which is followed in England. Nor does the slightest evil appear to have arisen from this course; and, although it endured through the most stormy and critical periods of our struggles for dominion in the East, yet no steps were taken, either by the legislature of this country, or the local courts, to deprive India of a single particle of this acknowledged benefit.

It was not until all political danger was at an end, and Lord Wellesley, then Governor-General of India, was in the plenitude of power, that he thought of placing restraints on the freedom of publication. He did not however attempt to obtain for his restraining regulation the sanction of the Supreme Court. He merely issued a circular through the office of the Chief Secretary to Government, *commanding* the editors of all newspapers, or other journals, published in Bengal, to send the proof sheets of their several works to the Censor appointed by himself, who would strike out whatever appeared objectionable to him, and the parts so struck out were not to be published, but at the editor's peril. The penalty of an act of disobedience on the part of the editor in declining to submit to the censorship thus arbitrarily established was *immediate banishment from the country*, with all its ruinous consequences; and this, without any form of trial or other means of defence on the part of the individual to be thus suddenly and ignominiously transported.

Unfortunately for the interests of justice, this severe punishment could be inflicted on any individual whom the Government might select, without the sanction of the judges, or even without their being able to interfere, by writ of *habeas corpus*, or any other mode, to save the victim of such a dreadful power. And although the avowed object of sending out British judges to preside over the courts in India was to make the law of England operate as a check on the arbitrary proceedings of its local go-

vernments; yet in this most arbitrary and most dreadful exercise of power, their control was perfectly inoperative. This arose from the circumstance that there existed in all the successive charters of the East India Company a clause which rendered it necessary for every British-born individual who wished to visit India, to obtain from the Court of Directors a license for that purpose: which license was made revocable at the pleasure of any of the local governors, without cause assigned; and, when revoked, left the individual liable to banishment from the country, as being no longer possessed of lawful power to remain there. To this the courts of justice could oppose no obstacle whatever: so that, in point of fact, the fortunes of every British-born individual in the country being entirely in the hands of the governor appointed by the India Company, he needed not the sanction of the Supreme Court for any regulation whatever: he could issue any orders or decrees he pleased—no matter how unjust, inexpedient, or repugnant to the laws of the realm, and make the penalty of non-compliance the forfeiture of the offending individual's license, and consequent banishment.

This decree or order of Lord Wellesley, enforcing the Censorship of the press in India, under the severe penalties described, remained in full force up to the year 1818, no English editor having been found, during this long period, willing to incur the ruinous consequences of disobedience, especially as a distinguished individual had been banished from India under circumstances of extreme severity, just previous to the establishment of this censorship, and the sufferings to which he had been consequently exposed were too deeply imprinted in the recollection of his countrymen to be speedily forgotten.

In the mean time the number of newspapers had greatly multiplied in Calcutta; so that the Censor (who was always the Chief Secretary to Government) found that the duty of reading the proof-sheets, sent for his inspection and revision, was extremely troublesome, and interfered considerably with his other official duties. This circumstance contributed, with other causes, to the abolition of the censorship in 1818, and the promulgation of a new code for the regulation of the press.

That abolition was the act of Lord Hastings, and great was the applause which he thereby gained in all quarters. The liberality of the measure, however, was only in appearance: the odium of the name of censorship was indeed removed, but the shackles of the press remained equally galling and oppressive. The prohibitory regulations substituted were quite as objectionable in principle as the censorship itself, and quite as illegal. They narrowed the limits of discussion within the smallest imaginable space, and left nothing open to the editors of the public papers

but matters as uninteresting as they were harmless. This code, however, like Lord Wellesley's decree for establishing the censorship, was most carefully kept from any contact with the Supreme Court of Justice. It was presented there neither for discussion nor approbation; it consequently never obtained the sanction of the judges, or the registration of the court, without which, by the statute, no regulations could be *valid*. It never, therefore, obtained the force of *law*, and no legal proceedings ever were, or could be, had for any infringement of its rules and directions. Why then, it may be asked, was it ever conformed to? The answer is plain—for the same reason exactly as that which made every one pay implicit obedience to the censorship of Lord Wellesley; namely, that, although the publication of any matters prohibited by these rules was not an offence known to the law, and could not therefore be punished by any process of court; yet, the power of revoking the license of any British-born individual for any, or for no offence, still existing in full force, the government always had this remedy in its hands; and if any editor dared to discuss any topic in a manner not agreeable to the government, whether the topic itself were prohibited or not, it could revoke the license of the offending editor without even assigning a reason for so doing, and the moment after such revocation, seize his person, imprison him for safe custody, and transport him as a felon by the first ship sailing for England, merely for being in India without a license.

It is worthy of observation, that neither the censorship established by Lord Wellesley, nor the new regulations framed by Lord Hastings, could operate except upon British-born subjects. With regard to that part of the community, which was the most likely to use the press for purposes offensive to the government, these arbitrary acts were, from their illegality, wholly inefficient. This was exemplified during the censorship. A periodical work appeared under the editorship of an Indo-Briton, one of the mixed race descended from British and Indian parents. He, being a native of India, needed no license to give him right of legal residence there; and to him, therefore, the power of summary banishment from the country, on the plea of being an "unlicensed resident," could not apply; so that he might, and in point of fact did, decline to submit his proof-sheets to the inspection of the Censor. He defied the Government on its own ground, knowing that it had no power to act against him, but by process of law through the Supreme Court; by which, of course, a refusal to submit to a censorship of the press could not be recognised as a crime, since no censorship had been lawfully established. The same resistance could obviously be made for the same reason, *by a native*, to the unregistered regulations which succeeded the censorship.

This was the state of the law when Lord Hastings resigned the government of India at the commencement of the year 1823. He had, however, himself abstained from acting on it during his administration, contenting himself with occasionally reminding offending editors that such a power existed and would be put in force if deemed necessary. But his Lordship had no sooner left the country than his successor (the honourable Mr. Adam,) who had for many years acted as the Censor of the Press, and was less favourably disposed than the Marquis of Hastings to permit any freedom of discussion, put this power into immediate force, by the banishment of Mr. Buckingham from India, for venturing to doubt the fitness or policy of a local appointment made under his administration, although the justice of these doubts have been subsequently made apparent by the removal of the individual in question, under an order of the ruling authorities in this country, and on the very grounds alleged by Mr. Buckingham, namely, the unseemly union of secular with clerical duties in the person of the same individual.

The course taken by Mr. Buckingham, on this occasion, was the only obvious one which the state of the case presented. To save the productive and valuable property from which he was thus suddenly removed from further jeopardy, he placed it in the charge and management of an editor who could not, like himself, be banished or punished in any other manner without a proceeding at law. This gentleman was an Indo-Briton; and as he ventured, as far as the libel law of England would admit, to discuss public measures, having nothing to fear but the verdict of a British Jury, the government of India (at the head of which Mr. Adam still remained till the arrival of Lord Amherst), bethought itself of a new expedient to extinguish the freedom which it had no legal power to control. As threats of summary banishment could not be held in terror over the heads of Indo-British editors, over whom no such power existed, it was important to create some other engine, which should apply to that class of subjects as well as to those of English birth; and although the sanction of the Supreme Court could not, in ordinary times, be obtained for any act clearly repugnant to the laws of the realm, yet the existing period was peculiarly favourable to their making the attempt. There was at that particular moment but one judge on the bench, who was supposed to be favourable to any legislative measure that might be introduced to restrain the press.

At this moment, therefore, under the temporary administration of Mr. Adams, who was merely holding the government of the country in trust for a few weeks, between the departure of one Governor-General and the arrival of his successor, and with only one judge remaining on the bench, were the following Regulations

framed, presented to the Supreme Court, and registered. By this registration they acquired all the force of British law, and were made binding on all the subjects of his Majesty throughout the territories of the East India Company, included within the government of Bengal. The official document is too long for insertion ; but, divested of its verbose phraseology and frequent repetitions, its substance may be considered as follows :—

“ The preamble sets forth, that matters tending to bring the government of India into hatred and contempt, and to disturb the peace, harmony, and good order of society, having been lately published in Calcutta, it is deemed expedient to regulate all future publications by the following enactments :—

“ 1st. That no newspaper, or journal of any kind, should be printed or published without an express license for that purpose from the Governor General in Council.

“ 2nd. That affidavit shall be made of the printers and proprietors of such publications, with the true account of all their shares in the same, both at the time of obtaining the license to print, and at all subsequent periods of change.

“ 3d. That every such license may be resumed and recalled by the Governor General in Council, at his pleasure, by notice in the Government Gazette.

“ 4th. That if, either before such license be granted, or after it shall have been recalled, any individual, whether master, agent, or servant, shall sell, distribute, *give, lend, borrow, or receive*, for the purpose of perusal or otherwise, any newspaper, journal, or pamphlet, not specifically licensed by the government to be so given, lent, or sold, he shall forfeit for every offence, a sum not exceeding 400 sicca rupees (about 50*l.* sterling).

“ 5th. That all such offences shall be heard and summarily adjudged by two or more justices of the peace, who are authorized, without the assistance of a jury, at once to determine the same, and issue their warrants for the levying such fines (and costs) on the goods of the offenders ; the fines to be paid into the treasury of the East India Company ; and in case of deficiency of goods to answer such fines, to issue their warrants for the seizure of the persons of the offenders, to be committed to the common jail of Calcutta, for a period not exceeding four months.”

The original of this document, of which we have given a faithful abstract, is signed by the four members of the existing Bengal government,—John Adams, Edward Paget, John Fendall, John Herbert Harington.

This was the rule, ordinance, and regulation, submitted by the Government to the Supreme Court at Calcutta (or rather to the single judge then sitting on its bench, Sir Francis Macnaghten), and the question to be raised was, whether this regulation was “just, reasonable, and not repugnant to the laws of the realm.” Counsel were employed on the part of the British community by the proprietors of the Calcutta Journal, who were almost all English gentlemen of the highest character and fortune, to argue against the registration ; and a memorial on the part of the native Indians, signed by the celebrated Brahmin, Ram Mohem Roy, and several others, were also presented to the Judge to the

same effect. Notwithstanding these efforts, however, to resist such an encroachment on the liberties of every man living in India, the Regulation was declared by Sir Francis Macnaghten to be just, reasonable, and not repugnant to the laws of the realm; and on that ground he registered it in the Supreme Court, and gave it the full force of law.

We had intended to have given a *precis* of the judgment which this learned person delivered on the occasion, in order to show what were the arguments adduced by him in support of his decision. But on going over it a second time, we confess that there appears to us no argument whatever; at least, nothing which, in the estimation of a lawyer, would be deemed worthy of being so named, or which would weigh, in the mind of any person accustomed to legal decisions, as a feather in the scale. He contends, indeed, that India is not *fit* for a free press, and that the government could not exist with it, though he offers no proof, or even reasoning, to support his assertion. But he says, that since the power of banishing British-born individuals from the country was given to protect the government, and since this power does not extend to individuals not British-born, it is necessary, and not at all repugnant to the laws of England, to frame some other regulations *to meet the case*: that is, whenever the power given by the legislature over any *one* class of subjects in India is found to be insufficient for all the purposes (whether unjust or otherwise) of the government there, it is not repugnant to the laws of England for the judges in India to create *new* powers, never dreamt of by the legislature, and extend these over *other* classes. It is only necessary to *state* such a doctrine: no one can think it necessary to refute it. Again, he contends that making every press in India subject to a license, revocable at the pleasure of the government, and giving justices of the peace power to inflict summary fines and imprisonment, is not repugnant to the laws of England, because licensing pervades every department of life here, from the clergyman to the hackney-coach driver; and more especially, because, by the 39th of Geo. III., every man must have a *certificate* before he can set up a printing press! It seems incredible that the Chief Justice of a Supreme Court, as that of Calcutta is called, should not see the difference between a certificate of registry, which any printer who chooses to set up any number of presses in England may have on application to the clerk of the peace of the county in which he resides, *and which no power can afterwards take away*, and a license for a press in India, which the government of that country may either refuse in the first instance, or afterwards take away at pleasure from those to whom it has been granted. It is difficult to believe, that an English judge should see no difference

between the summary power thus given to two justices of the peace in India and the trial by jury in England.

But to pass from this registered regulation to its immediate consequences, we shall see in these what were the topics the Indian Government wished to prevent from being discussed; and this will at once show whether the law and the first use made of it was not repugnant to the laws of England. Immediately on the regulation being registered, a by-law, which needed not this sanction of the Court, was passed by the Government, declaring that the licence of any paper or book should be revoked which ventured to touch upon the following subjects:—

“ 1. All contumelious reflections against any branch of the royal family of England.

“ 2. All observations on the measures of the Court of Directors of the India Company, the Board of Control, or other public authorities in England connected with the government in India; or on the measures of any of the local governments in India itself.

“ 3. All offensive observations relating to allied or friendly native powers, their ministers or representatives.

“ 4. All offensive insinuations against the Indian governors, commanders, councillors, judges, bishops, or any of the public officers of government.

“ 5. All discussions tending to create a suspicion in the minds of the Hindoos and Mohammedans of any interference with their religious opinions or observances.

“ 6. The republication from English papers of any thing coming under the foregoing heads.

“ 7. All remarks tending to disturb the peace, harmony, and good order of society.

“ 8. All anonymous appeals to the public relative to grievances sustained by any individuals in the King's or Company's service.”

The *naïveté*, with which the framers of this extraordinary list of forbidden topics declare that “ the foregoing rules impose no *irksome restraints* on the publication and discussion of *any* matters of *general interest* relating to European or Indian affairs ” can only be equalled by the celebrated speech of Figaro, so often quoted on this subject.

This bye-law was followed up instantly by another regulation for the interior of India, which resembled the one already given in many particulars; but contained the following additional provisions:

“ 1. Any one who should be found to have in his possession any book or paper, whether printed in Calcutta or elsewhere (in England, for example), or any materials for reprinting such papers or books, without the previous sanction of the Governor-General, might, on conviction before one magistrate, be fined 1000 sicca rupees (120*l.*), or imprisoned for six months.

“ 2. The single magistrate (himself a Company's servant, removable at pleasure) might attach all books and materials so found, and confiscate them at once; and, if suspicion were entertained of such books or materials being in any house, they had full powers given to enter it for the purposes of search and seizure.

" 3. The licence or sanction of government to be granted and withdrawn at pleasure: and any one after such withdrawal, *allowing* any of the unlicensed books or materials to be used, would be fined 1000 rupees, and all the property be seized and confiscated.

" 4. The Governor might prohibit the circulation of any paper or book (whether printed in India or elsewhere) by mere notification of prohibition in the 'Gazette;' and any such paper or book found after such notice in any person's possession, or traced through his hands, would subject the seller, giver, lender, reader, or holder of such book to all the penalties before described."

On the arrival of Mr. Buckingham in England, he, as principal proprietor of the Calcutta Journal, entered an appeal before the Privy Council against the regulation registered by Mr. Justice Macnaghten, and carried this appeal to a hearing at the Council Board. After considerable delay, it was there heard, and the appeal disallowed; his Majesty's advisers, including all the great law-officers of the crown, and many of the leading statesmen of the day, having confirmed the act of Sir Francis Macnaghten, which declared that the regulations for the Indian press, already recited, were in themselves just, reasonable, and not at all repugnant to the laws of the realm! On this we do not think it necessary to offer a single observation.

The Directors of the East India Company, on thus obtaining the sanction of his Majesty's Privy Council to this measure in Bengal, sent out immediate orders to their governments at Madras and Bombay (at the former of which places the censorship was still in force, and at the latter of which, the press had been put, by the exertions of the Bench, on the footing of the press in England) directing them to procure the immediate registration of the Calcutta regulation at each of these presidencies. At Madras, it appears the Company's orders met with immediate and ready compliance; the judges there offering no opposition to the measure. At Bombay, however, it was very differently received. It came on for hearing on the 10th of July last; and all the three judges then on the bench delivered their judgments *seriatim*, committing them to writing for the greater security of accuracy; and thus recording their opinions under their own hands. These judgments are so remarkable, and, as we think, so important, that we shall give them at length, and leave the reader to determine, after a perusal of them, whether the regulation in question was just, reasonable, and consonant to the laws of the realm.

Sir Edward West, the Chief Justice, is reported to have said,

" Before I consider the proposed regulation, I shall state what I conceive to be the duty of the Court on these occasions where regulations are passed by the local government, and by them transmitted to the Court for registration under the statute.

"By the 13th Geo. III., c. 63, sec. 36, it is enacted, That it shall and may be lawful for the Governor-General and Council of the said United Company's settlement at Fort-William, in Bengal, from time to time, to make and issue such rules, ordinances, and regulations, for the good order and civil government of the said United Company's settlement at Fort-William aforesaid, and other factories and places subordinate, or to be subordinate thereto, as shall be deemed just and reasonable, (such rules, ordinances, and regulations, not being repugnant to the laws of the realm), and to set, impose, inflict, and levy reasonable fines and forfeitures for the breach or non-observance of such rules, ordinances, and regulations; but nevertheless, the same, or any of them, shall not be valid, or of any force or effect, until the same shall be duly registered and published in the said Supreme Court of Judicature, which shall be, by the said new charter, established, with the consent and approbation of the said Court, which registry shall not be made until the expiration of twenty days after the same shall be openly published, and a copy thereof affixed in some conspicuous part of the Court-house, or place where the said Supreme Court shall be held; and from and immediately after such registry as aforesaid, the same shall be good and valid in law."

"This provision is extended to the settlement of Bombay by the 47th Geo. III. sess. 2, c. 68, sec. 1.

"It is to be observed, that this provision requires, in the first place, that such regulations are not to be repugnant to the laws of the realm; and,

"2d. That they shall not be valid, or of any force or effect, until the same shall be duly registered and published in the Supreme Court, with the consent and approbation of the said Court.

"Upon this provision, various constructions have been put.

"First, it has been stated, on the authority of a late learned Judge of the Supreme Court of Madras, who presided in the Recorder's Court here for a short period, Sir George Cooper, 'that the Court, except in cases where some gross and glaring infringement of the liberty of the subject is apparent on the face of the rule, have nothing to do with the legality of it, but that the Government is to decide on the fitness, justice, and reasonableness of it, and that it is for them to see and take care that it is not repugnant to the laws of the realm.'

"This supposed judgment of the learned Judge was published in the government papers of the 12th of April, 1823, and is as follows:—

"The power of framing rules, ordinances, and regulations, is placed in the Governor-General, and Governors in Council respectively, at each presidency. They, the Governors, aforesaid, are to decide on the fitness, justice, and reasonableness of the same, and it is for them to see and take care that such rules, ordinances, and regulations, are not repugnant to the laws of the realm. That the terms, consent, and approbation, referred to publication and registry only, and were used because it would be too much that any thing could be hung up and registered in that Court without its permission. That such publication and registry did not give them any additional weight in point of law; for if the Government made regulations which were repugnant to the laws of the realm, it was perfectly competent to that Court to decide against their legality in any issue there depending; in fact, that the publication and registry in the Court of the Recorder was nothing more than a declaration of the Court's knowledge of their existence, but did not prevent its affording relief when called upon to do so afterwards, should the circumstances of the case seem to warrant an interference. That the Court had, no doubt, the power of refusing to publish and register, but that it would only do so, when some gross and glaring infringement of the

liberty of the subject, arbitrary imprisonment, for instance, or something immoral, was apparent on the face of the rule sent for registry.

"In the first place, were such the true construction of the clause, what is the meaning of the term approbation? In the next place, the learned Judge is made to say, 'that such publication and registry did not give the regulations any additional weight in point of law; for if the Government made regulations which were repugnant to the laws of the realm, it was perfectly competent to the Court to decide against their legality in any issue there depending.' But what says the statute itself? 'that the same shall not be valid, or of any force or effect, until they shall be registered; and that from and immediately after such registry as aforesaid, the same shall be good and valid in law.' Besides, could any thing be more mischievous than that regulations should be passed and registered which the officers of the Government and others are to enforce, and which, were an action to be brought against them for such enforcement, might be declared to be illegal, and, consequently, no justification to them? It is clear that the proper construction of the act is, that the Court is to take care, in the first instance, before the rules are registered, that they are not repugnant to the laws of the realm, and that, as soon as registered, they shall be good and valid in law, unless disallowed by his Majesty, as provided by the act.

"2d. It may be, and indeed has been said, that, under this provision of the legislature, the Court has only a judicial, but not a legislative power—that it is to consider the legality, but not the expediency, of regulations proposed by the Government.

"In the first place, however, such construction is opposed to the words of the statute, 'that the regulations shall not be valid till they shall be duly registered with the consent and approbation of the Court;' the word 'approbation' is unrestricted and unqualified, and I do not understand how we can restrict and qualify the term by construing it to mean approbation merely in point of law. Had the legislature intended this, how easy would it have been to have said, such regulations not to be registered by the Court in case they shall consider them to be repugnant to the laws of the realm. In the next place, in all the proceedings upon the appeal of Mr. Buckingham to the King in Council against the regulation passed at Calcutta, it is taken for granted that the Court are bound to consider, and did actually consider, its expediency. Thus, a part of the second reason advanced by the Court of Directors of the East India Company in support of the regulation is as follows:—'That the restrictions imposed by the rule, ordinance, and regulation, which is the subject of appeal, were called for by the state of affairs in the settlements of Bengal, and were adapted to the exigency of the case; and that they were not injurious to His Majesty's subjects in the said settlement is to be inferred from the concurrent judgment of the Supreme Government of the East India Company, and of the Supreme Court of His Majesty.' The Court of Directors therefore assume that the Supreme Court did exercise their judgment upon the expediency and necessity of the regulation, and did consider that it was called for by the state of affairs and the exigency of the case. Mr. Sergeant Bosanquet also, in his argument as counsel for the Court of Directors, takes it for granted that the Court did exercise such judgment. 'It is,' says he, (b) 'for your Lordships' wisdom to determine whether in this case your Lordships do or do not agree in thinking that necessary and expedient which the local government has found to be necessary, which the Court established by His Majesty for protecting the rights of his subjects, and which is not the Court

of the East India Company, has thought expedient, and has adopted and registered in these regulations ?'

" Nor did the counsel on the opposite side, who impugned the regulation, ever contend that the Court had no right to exercise a judgment as to its expediency : to them, insisting, as they did, that the preamble to the regulation which recited the existing evils had not been proved, it would have been a strong argument, that the Supreme Court had exercised no judgment upon that point. They, however, did not touch upon such argument, and evidently because it was untenable.

" In many cases, too, it is impossible to separate the question of legality from that of expediency. In many cases, expediency may make that not repugnant to the laws of the realm, which, without such expediency, would clearly be so repugnant ; I would instance the suspension of the *habeas corpus* act. Would any one contend that such suspension would not be most unconstitutional, and in that sense of the term, most repugnant to the laws of the realm, if passed under circumstances which did not render it expedient, or rather necessary ? Would, on the other hand, any one contend that it were repugnant to the law, in case of such expediency or necessity ? The same observations may be made with respect to the many acts of parliament which the legislature has pronounced to be necessary by the disturbed state of Ireland. All of them would be unconstitutional, and, in that sense, repugnant to the laws of the realm, unless rendered necessary by the state of the country. Indeed, it may be said, that every law, every restriction of the liberty or the will of an individual, is repugnant to law, unless it be called for by necessity or expediency ; but there is this distinction, that many laws are evidently expedient upon the face of them, and from the known principles and propensities of human nature, and require no specific proof that they are so ; others may not appear to be expedient upon the face of them, and from the known principles and propensities of human nature, but may be shown to be so by evidence of particular facts and circumstances.

" It is clear, therefore, that the Court have a right, or rather are bound, to consider the expediency of proposed regulations ; that the Court has by the statute, legislative, and not simply judicial, functions to perform ; and that even if it were not so, if the Court were bound to exercise a power simply judicial, in many cases the legality depends so entirely upon the expediency, that the Court could not divest itself of the duty of considering it.

" I shall now proceed to consider the regulation in question.

" It must be premised, however, that the Press at this presidency is at present placed on precisely the same footing as in England. In March, 1825, a regulation was passed by the Governor and Council, (upon a suggestion from the Court, made the preceding September, of its necessity, on account of the continued misrepresentations of the Court's proceedings by one of the newspapers,) which was merely a copy of the acts 37 and 38 Geo. III., and the object of which was to afford to the public, and those who might be aggrieved by anonymous libellers, the means of discovering the proprietors, editors, and printers of newspapers, and other publications.

" The purport of the present regulation, which is the same as that passed at Calcutta, is to prohibit the publication of any newspaper, or other periodical work, by any person not licensed by the Governor and Council, and to make such licence revokable at the pleasure of the Governor and Council.

" It is quite clear, on the mere enunciation, that this regulation imposes a restriction upon the liberty of the subject, which nothing but circum-

stances and the state of society can justify. The British Legislature has gone to a great extent at different times, both in England and Ireland, in prohibiting what is lawful in itself, lest it should be used for unlawful purposes, but never without its appearing to the satisfaction of the legislature that it was rendered necessary by the state of the country.

"It is on this ground of expediency and necessity, on account of the abuses (as stated) of the press at Calcutta, from the state of affairs there, and from the exigency of the case, that the Calcutta regulation is maintained by its very preamble; by three of the four reasons of the Court of Directors upon the appeal; and by the whole of the argument of counsel upon the hearing of it.

"Thus, the preamble to the Calcutta regulation is—

"Whereas matters tending to bring the government of this country, as by law established, into hatred and contempt, and to disturb the peace, harmony, and good order of society, have of late been frequently printed and circulated in newspapers, and other papers published in Calcutta; for the prevention whereof it is deemed expedient to regulate by law the printing and publication within the settlement of Fort William, in Bengal, of newspapers and of all magazines, registers, pamphlets, and other printed books and papers, in any language or character, published periodically, containing or purporting to contain, public news, and intelligence, or strictures on the acts, measures, and proceedings of Government, or any political events or transactions whatsoever."

"The reasons of the East India Company embrace the same facts and the consequent expediency and necessity of the regulation.

"The first reason commences—

"Because the said rule, ordinance, and regulation, was made by competent authority, and was rendered necessary by the abuses to which the unrestrained liberty of printing had given rise in Calcutta. The preamble of the said rule, ordinance, and regulation, states, that matters tending to bring the Government of Bengal, as by law established, into hatred and contempt, and to disturb the peace, harmony, and good order of society, had recently, before the making thereof, been printed and circulated in newspapers, and other papers published in Calcutta."

"Again, in the second reason—

"That the restrictions contained imposed by the rule, ordinance, and regulation, which is the subject of appeal, were called for by the state of affairs in the settlement of Bengal, and were adapted to the exigency of the case."

"Again, in the fourth reason—

"The reasonableness of ordinances must depend upon the circumstances and situation of the country to which they are applied."

"I need not go through the addresses of counsel to show that the whole of their arguments in favour of this regulation are founded upon the fact, as stated in the preamble, of their expediency and necessity from the local circumstances and the exigency of the state of affairs at Calcutta; and I respectfully presume that his Majesty in Council approved of the regulation for the same reason, no others having been urged, and, in particular, upon the ground that the preamble of the regulation reciting such exigency was not traversable or questionable."

"But what is the preamble to the regulation which is now proposed to be registered in the Supreme Court at Bombay? Is there any recital of matters 'tending to bring the government of this country as by law established, into hatred and contempt having been printed and circulated in newspapers and other papers published in Bombay?' Nothing of the kind,

the preamble merely recites, that a certain regulation had been passed in Calcutta for the prevention of the publication of such matters. Is it the fact that such matters have been published in the Bombay papers? Can a single passage or a single word, tending to bring the government of Bombay into hatred and contempt; can a single stricture, or comment, or word, respecting any of the measures of government, be pointed out in any Bombay paper?"

"How, then, without such necessity as is stated in the preamble to the Calcutta regulation, can it be expected that, even were the Supreme Court to consent to register it, and an appeal were preferred, it would be confirmed by his Majesty in Council?—Where would be the reasons of the Court of Directors in favour of it; where would be the arguments of counsel in support of it?"

"Suppose an act of Parliament passed to suspend the Habeas Corpus Act in Ireland, on account of treasonable practices in that country; in such case, evidence of such practices would be laid before Committees of the two Houses of Parliament before the act was passed, and the act would also recite them, as the Calcutta regulation recites the evils which it was intended to remedy. But would the fact of such act having been passed for Ireland justify a motion to extend it also to England, without any evidence of any such treasonable practices; nay, when it was well known that there were no such, or any circumstances to call for it, and with a mere recital of the Habeas Corpus Act having been suspended in Ireland, as the proposed regulation merely recites, that the same regulation had been passed in Calcutta?"

"I am of opinion that this proposed regulation should not be registered."

The judgment of Sir Ralph Rice, which next follows, differed from that of the Chief Justice and Mr. Justice Chambers; there are, however, admissions in it of the highest importance; admissions, which apply not merely to the question of registration at Bombay, but go to impugn the validity, or at least the policy, expediency, and necessity of the original regulations.—The learned judge says—

"I have read the case of the Press in India before the King in Council; but still, I think, the clause as to the change in the proposed rule is repugnant to the law of England, and that policy did not, and does not, require it. It is argued, I think, too much, as if the natives had been at all affected by the licentiousness of the press; the mischief at Calcutta was wholly, I think, confined to the English, and would, I am persuaded, have remedied itself."

"Considering, as I do, that the liberties of England are part of the law of the land, and that they depend on the freedom of the press, I cannot conceive how a licence, which is to stop its mouth and stifle its voice, can be consistent with, and not repugnant to, the law of England."

"Though I entertain this opinion, I shall not object to the registry, because, as regards the repugnancy, I defer to the appellate authority, as I should on any point of law which they had decided contrary to my judgment; and with regard to the policy and the expediency, I do not think the legislature intended to leave them so much to the consideration of the Court as to the Government; which ought to be the better judge of such subjects, and which must now be presumed to have formed a proper judgment. It is not desirable that the judicial should ever be mixed with the

executive, or combined with the legislative; and Parliament having legislated so much for British India, it is a pity, I think, that a question of such vital importance, with analogy to England, should not have emanated in, and had the sanction of, Parliament.

"I feel further justified in acquiescing in the registry (now that I have stated publicly my opinion), because the decision of the council must be known to Parliament, and, if Parliament should object, it was easy to propose a bill to limit, and more accurately define, the local authority; and when one considers of whom the Privy Council consists, and who were the advocates for Mr. Buckingham,—men all eminent in Parliament as well as the profession,—one cannot avoid feeling, that ulterior measures would have been adopted in England, if the opinion which I unhappily entertain, as to the repugnancy and the necessity of this rule, had been current and general."

Mr. Justice Chambers agreed in opinion with the Chief Justice in disallowing the regulation. His judgment was as follows:

"In order to explain clearly the grounds of my opinion on the present occasion, I think it necessary to advert in a cursory way to the circumstances under which this regulation is presented to us. In consequence of the recent decision of the Privy Council against Mr. Buckingham's appeal, it has, I believe, been recommended by the Court of Directors to the local governments of Bombay and Madras to propose that the Bengal regulation regarding the press should, *totidem verbis*, be registered, and become a part of the local law of each of these presidencies; and the government of Bombay so far acquiesce in the views of the Court of Directors, as to propose it for our registration, according to their recommendation. It appears to have been thought, that the decision in that particular case is tantamount to a legislative declaration, that the same, or similar regulations, are so consonant with the general policy of the Indian government, that they need but to be proposed in order to be adopted. If, indeed, that decision bore in any way directly upon the general question of the expediency of such regulations, there is no man in the situation of a judge who would not feel great deference for such authority. But, unless it could be shown, that such a decision bound us with the force of an act of parliament, even then, I conceive, a judge, would, on the present occasion, feel it to be his duty to consider *de novo* the general principles, and exercise most conscientiously the discretion the legislature had vested in him. But when grounds may readily be suggested for that decision, wide of the principle upon which we are called upon, prospectively, to consider the expediency of the present regulation, I am at a loss to imagine what necessary and immediate connection there is between the decision of the Privy Council and the proposal of it for our adoption. The decision of the Privy Council, stripped as it is of all the grounds upon which it was formed, presents to my mind merely a confirmation, retrospectively, of a solemn act of the Supreme Government in Bengal, in conjunction with the Supreme Court, upon a subject-matter expressly within their authority; under circumstances which, if true, might justify that act, and of the truth of which circumstances they alone were the competent judges. What bearing or what material influence can such a decision have on our minds, who are called upon at another place, under totally different circumstances, to consider, prospectively, the expediency of introducing the same regulation, not as a remedy for any existing or imminent evil, but as a general and permanent act of legislation? The preamble, it may be said, was not proved, nor required to be proved, to be true before the council; but that, I conceive, could no more be done, than the Court of King's Bench could require the proof of

any special finding of a jury on a special case brought before them; and it does not therefore follow, that the preamble is mere waste paper, and unnecessary to form a ground-work for such restrictive regulations.

"All such regulations being confessedly restrictive of natural liberty, to a much greater extent than it has ever been thought necessary to carry matters in our own country, (I mean in the best time, or in the way of permanent enactment,) whatever distinctions may be made by the terms *contra legem* and *preter legem*, to common understandings they are as much opposed to the ordinary notions of English law, as light is to darkness; and necessity alone, and that of a very obvious and permanent kind, can justify, in my judgment, their registration. In all such cases of imperfect definition of legal rights, it is impossible not to see that the situation of the different places may require different legislative enactments, and what may be necessary at one place, may be perfectly superfluous at another. In the same way, even in the same place, it may be premature to introduce strong measures at one time, which, at a riper period of society, may be deemed highly beneficial. There is no subject, indeed, the consideration of which is acknowledged to require a sounder discretion with reference to local circumstances, or in which local circumstances have so direct an operation, in determining the legality or illegality of particular measures. In every separate jurisdiction, therefore, it must be matter purely of discretion, how far and when it is expedient to introduce restrictive regulations of this nature.

"Without, therefore, considering very minutely the particular tendency of the regulation proposed, although I have no hesitation in saying, that if registered, its general tendency would, in my opinion, be most prejudicial to the independence and good spirit of the community; with respect to the necessity of introducing any such regulation at all at the present moment, I conceive there cannot be two opinions. In a time of perfect tranquillity—with a small community of Europeans, and a native population submissive even to servility—the only effect would be imposing new shackles to restrain no evil, and, by leading to by-paths of favour and influence, to create perhaps a greater practical evil than any it can ever obviate. Indeed, nothing can exhibit in a stronger light the difference of circumstances in which this presidency is placed, than the total omission of the preamble of the Bengal regulation in that now presented to the Court for registration: a preamble, the conviction of the truth of which would alone induce me to countenance any such measure. Nothing more is necessary to show how perfectly inapplicable the state of things here is to such restrictive measures than the perusal of that preamble; not one word of which has, or is likely to have, I trust, for a long period of time, any force as applied to this presidency. The disposition and character of the people is not the greatest difference of circumstances to be attended to; the weighty and important difference between the situation of the two places consists in the enactment at this presidency of an intermediate set of regulations, in conformity with the well-known Act of the 37th Geo. III., which were registered in the course of the last year, by which, in my humble judgment, every rational object of government is attained, consistently with perfect liberty, both social and particular. When it shall be shown by experience, that this Court, administering a law which has been found completely effectual in England to restrain licentiousness, and, during a period of thirty years, has operated on society with the most beneficial effect, and has found no revilers even amongst those whom it has brought to justice, shall be found not sufficient to ensure peace and order in society, and stability to the government, it will be then time enough to listen to suggestions which I consider so objectionable in principle as this regulation.

" It seems to have been argued that the only question for the judges to consider is, whether the regulations proposed are, or are not, repugnant to the existing mode of governing British India? It is true, that in this mode of arguing, scarcely any regulations would be inconsistent with law, which fell short of unlimited and arbitrary power. But upon the principle which I have before stated, namely, that legality or illegality, as applied to such a subject, depends entirely upon the apparent necessity of the case, I conceive that the full legislative discretion which the Parliament of Great Britain exercises in all cases affecting the liberty of the subject, is intended to be delegated to judges of this Court, in conjunction with the government, in registering and making local regulations, restrictive of the usual and ordinary rights of individuals. In the exercise of such a discretion, I am of opinion, that ten thousand deviations from the law of England, in particular cases, would form no argument for adding one more to the catalogue, nor would the circumstance of so many previous anomalies make one fresh one consistent with it.

" Another argument which has been used had some influence with me. The effect of the actual state of things has been forcibly represented with regard to British subjects residing in India with or without licence; the principles of government of the British and native population without the limits of the seat of government are also stated; and then it is asked, whether the small portion of the native population residing in Calcutta, or the other presidencies, were intended to be governed in a different manner? To which I answer, that by the establishment of the supreme courts at the presidencies, I conceive that it was the intention of the legislature that both British and native inhabitants, within the ordinary limits of the presidencies and the jurisdiction of these courts, should enjoy the full benefit of English law, and consequently should be governed in a different manner from those in the provinces. It may be said, that the power of sending British subjects home extends to those residing in the presidencies as well as to others; but it must be remarked, that this power, as it has been exercised over the press, has probably never been in the contemplation of the legislature at all. It is a consequence of the discretionary power vested in the government for general purposes, and the particular acts of the government regarding the press have been confirmed by the courts of law; because it would be difficult for any mind to form a distinction between this and other cases in which individuals became obnoxious to the government. But whether this, or any other government, under existing circumstances, would deem it expedient to frame any regulation relating to British subjects, restrictive of the press, (nakedly considered,) is another question, and which is deserving very serious consideration. Both in Bengal and elsewhere, it has been thrown out, that nothing short of the present proposed regulation would be effectual to restrain even British subjects from writing inflammatory publications. Because, if the editor and proprietors were all Asiatics, and could be indemnified from the consequences of prosecution, British subjects might, under their names, write and publish things offensive to the ruling power. Whenever the period shall come when such a state of things is possible, and when all legal modes of repressing the evil shall have been tried, and tried in vain, it will be time enough to attach some weight to any argument which may be derived from such a source. Till that time arrives, I am of opinion that the proposed regulation is not expedient, and I decline giving my voice in favour of its being registered."

Two judges out of the three being against the registry, the judgment of the Court was, That the Regulation should be disallowed.

ART. VI.—LAW OF EVIDENCE.

*Tractatus et Regulæ de Testibus, Clarissimi Jurisconsulti
Johannis Campegii, Bononensis. Coloniae Agrippinæ, 1575.*

WHETHER the author of this treatise was allied by blood to the illustrious Cardinal Campegio, who, in the case of Queen Catharine's divorce, gave such convincing proof of his proficiency in all the mysteries of judicial procrastination, we are not prepared to say. But even with so strong an additional claim to our respect, he could scarcely complain of being placed by us in juxtaposition with two learned magistrates of the ancient and loyal city of London. In order to do so, we shall extract, from his treatise, a very simple and short rule couched in most intelligible language: "Infidelis repellitur a testificando; fallit tamen hoc, ubi alia probatio deficit, quia tunc admittitur ad testificandum." Regula 44. Here there are two things observable. The first is, that infidelity is stated generally to be a disqualification in a witness; which, considering that the treatise was published in the sixteenth century, would not much surprise us, even if the doctrine were altogether strange to our ears. The second is, that this disqualification is made to yield to the paramount considerations of public justice; which must, of necessity, surprise us, knowing that, according to the law of England in the nineteenth century, the interests of public justice are made to yield to the doctrine of private disqualification.

Let us now hear the English Law of Evidence as propounded and applied by the Recorder of London at the last sessions. The following report is taken from one of the daily papers, and we have no reason to doubt its accuracy:

"John Harwood stood indicted for stealing the ornamental brass fronting of the shop of Richard Carlile, bookseller, of Fleet-street. Carlile was the first witness; he was sworn on the New Testament, and the following colloquy took place:

"Recorder. What is your name?—Carlile. Richard Carlile.

"Recorder. Have you been sworn?—Carlile. I have.

"Recorder. How have you been sworn?—Carlile. In the usual form.

"Recorder. On the Gospels?—Carlile. I understand it to be the Gospels.

"Recorder. Is that oath binding on you?—Carlile. *I hold the form of swearing to be a solemn promise to speak the truth, and—*

"Recorder. Sir, do you believe in the Gospels?—Carlile. To so general a question I cannot answer.

"Recorder. Do you believe the Gospels, yes or no?—Carlile. I have fairly examined the Gospels, and, as matters of history, I do not believe them to be accurate.

"Recorder. You do not believe the Gospels to be the word of God?—Carlile. No; but I believe in them, I think, as much as any body does.

"Recorder. Then how are we to bind you?—Carlile. *I feel that I am bound to speak the truth; I respect the truth as much as any man.*

"Recorder. Do you believe in a God?—Carlile. I do not understand the term.

"Recorder. Question repeated.—Carlile. You will please to explain your meaning; I do not understand your question.

"Recorder. Then you are the only person in Court who does not.—Carlile. It is not a fair question.

"Recorder. It is a simple question.—Carlile. I do not think so; it is, in my opinion, a most complex and difficult one.

"Recorder. I again ask, do you believe in a God?—Carlile. I do not understand, and cannot reply to a question so undefined.

"Recorder. I shall not enter into a definition of the meaning of the word God. Do you believe in a God, yes or no?—Carlile. I have already given an answer.

"Recorder. Then, *I will not suffer a person to be convicted upon the accusation of a man who dares to publicly avow his disbelief of the Scriptures, and of God.*—Carlile. I make no accusation.

"Recorder. Go down, sir."

The law of evidence has too many deformities to admit of exaggeration. We must in this case, therefore, separate that which is law from that which is not law. The learned Recorder states it as one of the reasons for rejecting Carlile's testimony, that he "*dared publicly to avow his disbelief of the Scriptures.*" But every one who is conversant with the practice of the courts knows, that a disbelief of the Scriptures has long ceased to be a disqualification;—that the evidence of Jews, Mahometans, Hindoos, &c. is admissible, and constantly admitted;—and that it has now become an established maxim of the law, that where a person believes in a God, the obligation of an oath, and a future state of rewards and punishments, he cannot be objected to as a witness, on the score of religion. This portion consequently of the Recorder's sentence must be placed to the account of his orthodoxy, and not of his law.

The other reason assigned for rejecting Carlile is, that he "*avowed his disbelief of God;*"—and this would be beyond doubt a valid legal objection. But in the above report no such avowal appears. When asked whether he believed in a God, he objected to the question as 'an unfair question, as complex and difficult, as too undefined for him to understand or reply to;' and he requested the Recorder to explain his meaning. There was nothing in his answers from which we are entitled to infer that he did not believe in a Supreme Being. On the contrary, the natural inference is, that he did believe, although his belief probably was not in strict accordance with the Articles of the Church. Thousands of persons, it is most true, believe or profess to believe in a God, without ever having inquired into the grounds of their belief, or into the meaning which they affix to the term. Some indeed have regarded their creed upon the subject, not as a matter of religion,

but a point of loyalty ;—as, for example, the courtiers of Henry II, of France, who, as the learned Henry Stephens informs us, were wont to say, “ Qu'ils croyoyent en Dieu, comme leur roy y croyoit, mais que s'il n'y croyoit point, ils s'efforceroient de n'y croire point aussi (a).” We know also that some of our own Puritans would acknowledge no other God but the God of the Covenant ; and even in more modern times we have heard of ‘ le Dieu de St. Louis,’ as contradistinguished from that Deity which is the lover of peace and justice. Carlile may, therefore, have wished to ascertain in what particular sense the Recorder used the expression, and what opinions, religious or political, were according to his ideas comprehended under it. But whatever may have been his motive in asking for an explanation, it is at least certain, that he did not avow his disbelief in a God.

The next point to be considered is, how far the other terms of the legal qualification were complied with. That Carlile felt the obligation of an oath is very evident. “ I hold the form of swearing to be a solemn promise to speak the truth.”—“ I feel that I am bound to speak the truth.” Nothing could be more explicit. We have no means of judging whether he believed in a future state of rewards and punishments ;—he was not questioned on the subject ; and to assume that he did not believe, would be unjust as well as preposterous. Upon the whole then, for any thing that appears on the face of the report, Carlile was a competent witness ; and if that report be correct, we are justified in pronouncing the Recorder's sentence of exclusion to have been partly unfounded in law, and partly unsupported by fact. The prisoner, we are told, was found guilty upon other evidence ; but what the nature of that evidence was, or how the articles stolen were proved to be the property of Carlile, we are not informed.

Shortly after the above occurrence, a Mr. Taylor appeared before the Lord Mayor to answer a charge brought against him by Thomas Collins. The witness having been sworn,

“ Mr. Taylor asked him if he believed the book on which he had been sworn ?—The witness said he did.

“ The Lord Mayor said, he did not see what this had to do with the question.

“ Mr. Taylor wished to know what security he had that the witness would speak the truth ?

“ The Lord Mayor said, that the law attached penalties to those who were guilty of perjury, and that these penalties were the security which the prisoner had on the one hand, and public justice on the other, that nothing but the truth would be spoken.”

This is the language of common sense ; but common sense and the law are not unfrequently at variance ; for where a witness does

(a) Apologie pour Herodote, ch. 14.

not believe in a future state of rewards and punishments, the law, as we have already seen, is so far from regarding the penalties attached to the crime of perjury as an adequate security, that it excludes his testimony altogether. The Lord Mayor, therefore, although right in his application of the law to the individual case before him, was incorrect in his statement of the general principle. His error, however, would seem to have arisen from a laudable desire to render the law more consonant to sound reason, and the general interests of justice; whereas the Recorder's error would appear to indicate a wish that the law should be restored to its ancient consistent symmetry of absurdity.

With respect to the judicial oath, many highly intelligent and conscientious persons, among those the most attached to the established church, have objected to it upon religious grounds alone. Observing how unimpressively it is administered; how lightly taken, and with what reckless indifference it is violated; how frail a security it furnishes that the truth will be spoken, inasmuch that the satire of the poet is almost verified,

For in all courts of justice here
A witness is not said to swear,
But make oath, that is, in plain terms,
To forge whatever he affirms;

they have recommended the substitution of some other form of asseveration, which might obviate so great a scandal; following the example of that pious prince, who, perceiving the tendency of his subjects to perjury, and wishing to save from profanation the relics of the saints, caused an empty reliquary of crystal to be used in administering an oath. (b) But we confess we are not so visionary as to imagine that a nation so long used to the luxury of swearing; where an oath is considered as essential to business as a dinner, and where a man may, in the course of his life, have the good fortune to take some thousands, official, ministerial, and judicial; we are not visionary enough to imagine that such a nation will readily condescend to the simplicity of aye, aye, nay, nay.

The Quakers, indeed, refrain from swearing, even in a court of justice. For their conscientious scruples upon this head, they underwent a long persecution: the legislature, however, at last admitted their solemn affirmation in civil cases, but excluded their testimony, except upon oath; in criminal matters; and thus remains the law at present. Whence arises this distinction? Is it that there exists a stronger temptation to deviate from the truth in criminal than in civil matters? Or that the judge and jury have less need of information as to the real state of the facts in a case affecting a man's life than in one affecting his property? Scarcely so; but the law will not permit a man's life or liberty to

(b) Velly. *Hist. de France*, li. 335.

be endangered in a court of justice, except upon oath. A man may be murdered in the presence of fifty Quakers; a Quaker woman may be violated, with every aggravating circumstance of atrocity; the law will take no cognizance of the transaction; the offender may walk abroad unmolested, and brave the outraged feelings of society.

The absurdity does not even rest here. The law, as we have said, will not permit a man's life or liberty to be endangered in a court of justice, except upon oath. Pernicious as the rule is, it sounds, at least, like humanity. But the law will not allow a man's life *to be saved*, except upon oath: no, not even as to the character of the accused is that solemn affirmation admitted, which, in civil proceedings, has the sanction of the legislature. In a charge of murder, there may be any number of Quakers, who could establish an alibi, or prove that the deceased was the unprovoked aggressor, and that the prisoner struck the fatal blow in self-defence. Unless they belie their religion, the innocent must suffer; the law will have an oath. It was observed by Lord Mansfield, in *Atcheson v. Everitt*, that the Quakers now are "in a worse condition than they were when their sect first arose; for, before the 7 & 8 W. 3, c. 34, if a Quaker were indicted for a capital offence, he might call Quakers as witnesses in his defence, and that without oath—for formerly the prisoner's witnesses were not sworn. But now, by 1 Ann. st. 2, c. 9, s. 3, all persons examined in criminal cases must be examined on oath, both for and against the crown; therefore, if a Quaker be indicted he cannot have the benefit of Quaker testimony." (c) To the honour of the Court of King's Bench, it must be stated, that, in the case just quoted, the opinions of the judges were strongly expressed against the justice and expediency of rejecting a Quaker's affirmation in criminal matters.

If this was a solitary anomaly in the law of evidence, it would probably excite our warmest indignation. But the law of evidence has, by the frequency of its offences against common justice and common sense, established the same species of claim to impunity, as that so well understood by Juno in the *Iliad* (d). It

(c) Cowper's Rep. 391.

(d) Jupiter, acknowledging the force of this claim, says,

Ἦρῃ δ' αὖτις τοσόν γεμισίζομαι, ὅδε χολύμαι.

Αἶψα γὰρ, οἱ ἐωθέν ἐνέκλαν, ὃ, γτὶ νοήσω. Il. 9. 407.

In Pope's version, the point of the original is here, as in a hundred other passages, utterly lost;

For Juno, headstrong and imperious still,
She claims some title to transgress
our will.

The same idea occurs in Polybius, lib. iv. 16.

Οὕτως ἡ συνεχὴς ἀδικία συγγνωμῆς
τυγχάνει μᾶλλον τῆς σπανίου καὶ πα-
ραδοξοῦ πονηρίας.

presents, indeed, a spectacle, to which those who have made English jurisprudence their study are unhappily but too familiarised;—a confused and unconcocted mass of rules, framed at random, without unity of design, sequel, or connection. The exertions of eminent and accomplished lawyers have reduced them to somewhat of form and consistency. But, greatly as we admire the talents of those individuals, and their ingenious efforts to discover a principle or a reason where, alas ! no principle or reason was to be found, we cannot but perceive, that the very regularity with which the rules of evidence are now marshalled only serves to render their inherent defects the more conspicuous. As long as they were scattered through hundreds of volumes, their incongruities and contradictions could only appear in small detached portions; but now that they are brought together, and methodically arranged, they jostle one another in most unseemly conflict.

The exclusion of testimony is perhaps the most censurable part of the law of evidence, as it is also the most prejudicial to the ends of justice. We boast largely of the superiority of our procedure over that of other countries, and of the greater facilities which oral examination affords for eliciting truth, and detecting falsehood. And yet as if we distrusted the efficacy of our own instrument, we circumscribe its operations within the narrowest possible limits;—as if we were afraid of arriving at *too* high a degree of certainty, or were alarmed lest *too* much information should be let in upon us, we intrench ourselves behind a barrier of artificial disabilities and technical objections, often thereby closing up the only avenue by which truth might approach us. It would not be difficult to prove, that even in a case of strong and acknowledged interest little danger could possibly arise from the examination of a witness. Facts will often dovetail together with a nicety and precision which no craft or ingenuity could contrive; and, at all events, the natural jealousy with which such testimony would be scrutinised would always be an adequate security against its sinister influence.

The rejection of testimony on account of interest has, however, some semblance of a reason: not so with respect to the other grounds of rejection recognised by the law of England. One of these is ‘*propter delictum*,’ a conviction of an infamous crime. The crimes, denominated infamous, which disqualify a witness, are treason; felony, except petit larceny; perjury and subornation of perjury; forgery; swindling; cheating; *piracy*; *barrettry*; *conspiracy*, at the suit of the King; *præmunire*; the bribing a witness to absent himself; attain of false verdict; winning above ten pounds by fraud or ill-practice at gambling. When a person is convicted of any of these offences, “the law considers his oath to be of no weight, and excludes his testimony as of too doubtful

and suspicious a nature to be admitted in a court of justice to affect the property or liberty of others (e)."

Now by 21 Jac. 1, c. 3, to *cause proceedings to be stayed in any suit for a monopoly, except by writ of error or attainr*, is a *præmunire*. By 16 C. 1, c. 21, and 1 Jac. 2, c. 8, it is *præmunire* to obtain a grant or patent for the sole making or importing gunpowder or arms, or to molest other lawful makers thereof. By 6 Ann, c. 23, if the assembly of Peers in Scotland, convened to elect their sixteen representatives in parliament, *shall presume to treat of any other matter save only the election*, they incur the penalties of a *præmunire*;—and by 12 Geo. 3, c. 11, every person who shall knowingly or wilfully *solemnise, assist, or be present at* any forbidden marriage of such of the descendants of George II, as are by that act prohibited from contracting matrimony without the consent of the Crown, shall incur a *præmunire*. The oath, therefore, of the gunpowder-patentee, of the Scotch Peer, of the assistant at the royal marriage, and of the clergyman who solemnises the marriage, is "considered by the law to be of no weight," and the testimony of each of these persons is absolutely excluded!!

But not to dwell upon minor absurdities, let us look to the principle of the rule itself. A man is convicted of a certain crime, the worst, we will suppose, of those above enumerated. He thus contracts, in the eye of the law, it would seem, such a moral taint as renders him henceforth incapable of speaking the truth in a court of justice. The point at issue may be totally indifferent to him, the parties unknown; it matters not; he will distort the facts gratuitously; he will perjure himself, for the mere pleasure of perjury. If such moral and intellectual obliquity is the natural consequence of a conviction, it is certainly for the advantage of society that the testimony of the convict should be excluded. But the advantage of the community is one of the very last objects which enters into the calculation of the law of evidence. The truth is, that the law looks not beyond the individual disqualified; it inflicts disqualification as a punishment, and it inflicts it with a noble disregard of consequences. It condemns a man for his offences to be henceforth useless to the community as a witness;—it sentences him to silence as to facts, which it may be the interest of thousands that he should disclose;—it banishes him for life from the genial atmosphere of a witness-box; dooms him to forego the luxury of cross-examination; and, in order to effect this consummation of punishment, it runs the risk of crushing innocence, exonerating guilt, sanctioning the most wrongful claims, and involving the administration of justice in darkness and uncertainty.

(e) Starkie on Evidence, p. 4, 714.

“ Il y a un mode de punir, ou, pour faire une égratignure au coupable, on passe une épée au travers du corps d'un innocent (f); and such, as Mr. Bentham justly observes, is this punishment of disqualification.

But mark the consistency of the law. A person convicted of a crime is not permitted to give evidence in the most indifferent matter, where he can have no possible interest to pervert the truth; —an accomplice in a crime of the same malignity is a competent witness; not for any trivial purposes in which he is wholly uninterested, but for the very purpose of convicting his associates, and thereby securing his own pardon. “ The credit to be given to such a witness is for the consideration of the jury: the acknowledged turpitude of the witness must necessarily stamp his testimony with suspicion; and it is to be the more carefully watched; since such a witness lies under a strong temptation to substantiate the account which he has already given, in the hopes of pardon, and is likely to suppose that his object will be gained by a conviction, and may be frustrated by an acquittal (g).” And why, it may be asked, should not the *credit* of a witness be left to the consideration of the jury alone, where the turpitude is infinitely less; where the crime has suffered its appropriate punishment, and where the temptation to deviate from the truth does not exist? If the verdict of a jury depended, not upon the weight and value of the evidence, but upon the number of swearers on each side, there would be perhaps some reason for this rule of exclusion; but such not being the case, the rule is as preposterous as it is mischievous. (h)

Another ground of incompetency we have before alluded to; — a want, namely, of religious belief. Modern practice has indeed very much narrowed this disqualification; but even as the rule now stands, it is only necessary to examine the reasoning upon which it is founded, to prove its absurdity. The law assumes that where a person does not believe “ in the existence of a Deity, or in a state where that Deity will punish perjury,” there can be no sense of moral obligation, no check upon his conduct, no security that he will speak the truth. If we possessed the means of looking into a man's mind, and ascertaining the real state of his belief without his assistance, we might possibly be justified in rejecting his testimony, on account of his creed. But how do we derive our information? We question himself; and if, as the law argues, he has no check upon his conduct; if, as an Atheist,

(f) *Theorie des Peines et des Re-compenses*, i. 367.

(g) *Starkie on Evidence*, p. 4. 21.

(h) We recollect a case in which

the validity of a will was questioned, because the testator's footman, who witnessed it, had some years before been convicted of sheep-stealing.

he must of necessity be unprincipled, he will, of course, should it be an object to him to pervert justice by his evidence, profess to believe, and no one on earth can contradict him. We are obliged to trust to himself to prove his own incompetency. Should he possess sufficient honesty and sincerity to avow his disbelief, we reject him as unworthy of credit ;—deliberate falsehood will make him a sound and competent witness.

ART. VII.—PROPOSED ALTERATIONS IN THE COURTS OF COMMON PLEAS AND EXCHEQUER.

CONSIDERABLE doubts may fairly be entertained, whether justice would not be much better administered to the mass of the people by local courts, permanently fixed in different parts of the country, possessing exclusive jurisdiction over matters of every description within their own districts, than by a number of distinct courts, all sitting in the same place, with a concurrent jurisdiction over the whole kingdom. Our own opinion is in favour of the former, and we hope to be able to enlarge upon this subject, and show the reasons for our opinion in a future number of this work. But whatever may be thought upon this question, there can be no doubt that when we find courts of the latter description already established, they should all be made as efficient as possible, and that it should not be suffered that some of them, from the manner in which they are constituted, should be nearly useless, while the others are so overloaded with business, that the length of time, which must of necessity intervene before a matter brought before them can be heard, will very often amount to a total denial of justice. This however is the present state of the four supreme courts of this country.

By means of the fictions which have been adopted or permitted by the Courts of King's Bench, Common Pleas, and Exchequer, all civil actions, (except real actions which are exclusively under the cognizance of the Court of Common Pleas, and which are extremely rare), may now be brought in any one of these three courts the suitor pleases. The Court of Exchequer has also in the same manner obtained concurrent jurisdiction with the Court of Chancery in almost all matters except lunacy and bankruptcy. It nevertheless has happened that the Courts of King's Bench and Chancery have for a long time been overwhelmed with business, while the Courts of Common Pleas and Exchequer have been, if not utterly idle, at least very little employed. This evil arises from several causes, all of which, however, might be removed, as we shall immediately show, without any difficulty; by a very few

alterations in the constitution of the latter courts. Among these causes we do not include any difference which may exist between the talents of the judges of the several courts, because the state of the bench of the Common Pleas and Exchequer has, we believe, arisen from the inefficiency of these courts, and not the inefficiency of the courts from the state of the bench; although there is no doubt, that the effect has to some extent operated again as a cause. Owing to the comparative unimportance of these courts the same attention has not been given to them as to the others, either by the bar or by the public. Judicial appointments have often been made in the Courts of Common Pleas and Exchequer, which would never have been ventured upon in the Court of King's Bench. (a) Render the Courts of Exchequer and Common Pleas in other respects as efficient as the King's Bench and Chancery, and public opinion will be equally powerful in preventing the appointment of improper judges to the former as to the latter.

Independently of any supposed difference between the judges of the several courts, which we put out of the question for the reasons before-mentioned, there are defects in the constitution and rules of the Common Pleas and Exchequer quite sufficient to account for the disfavour into which they have fallen. We will endeavour shortly to point out these defects, and to suggest in what manner they might be remedied.

The principal, if not the only reason, which prevents the Court of Common Pleas from bearing its equal share with the King's Bench in the civil actions of the country is, we have no doubt, the exclusive privilege which the serjeants enjoy of pleading there. No barrister can practise in the Common Pleas in term time who has not been called by the King's writ to the 'state and degree of a serjeant at law;' and Lord Eldon has made the granting this writ a matter of favour. There are now but fifteen serjeants *professing* to practise in court, and not more than ten who actually do practise there. This legal monopoly deters the suitor from bringing his action in the Common Pleas, he naturally goes to those courts where he may select what advocate he chooses to plead his cause; where he is not compelled to elect among a small body of persons nominated by the Chancellor, but may employ any

(a) These observations apply more particularly to the Court of Exchequer. The office of Puisne Baron has sometimes been made an asylum for age and infirmity, a noiseless and elegant retirement, '*Senes ut in otia tuta recedant*;' at other times a receptacle for those law officers of

the crown whom the minister felt himself compelled to provide for, but did not venture to place in a situation where, from the business which they would have to do, their incompetence would have been too conspicuous.

individual at the bar whom he thinks most competent to defend his interests. "Why then," as Mr. Miller has well observed in his Inquiry into the Civil Law of England (b), "is this fraternity continued. It is injurious to the bar, as the length of standing required for admission, and heavy charges consequent upon it, must prevent persons from making application for that purpose who are well entitled to it; and even when application has been made, the power which the Lord Chancellor possesses of granting or withholding it, gives him a control over the profession of the law, with which no conscientious public officer can desire to be invested. It is even more injurious to the general usefulness of the court than to the interest of the bar. Those who have a monopoly of legal argument are as likely to become careless or inexpert in the management of their business as monopolists of any other description, and it is not natural to suppose, that so many causes will be heard before a tribunal where there are only ten or twelve practitioners as where there are two or three hundred. When there is so much necessity as exists at present for increasing the efficiency of all courts of justice, one is surprised how so complete a specimen of legal monachism has been permitted to outlive the eighteenth century. The proper period for the dissolution of the order would have been in 1731, when the 4th Geo. 2, c. 26, abolished the old law-handwriting, law French, and law Latin." There can be no doubt that if the monopoly of the serjeants were now abolished, and the Court of Common Pleas thrown open to the bar, many more actions would be brought in it than are at present; that the King's Bench would consequently be eased of a portion of the business with which it is now overloaded, and the administration of justice generally improved. No reason whatever, that we can see, can be urged against the measure, except that it will diminish the value of the Chancellor's patronage. The judges of the Court are understood not to be averse to it. The serjeants will hardly venture to make any opposition, or even in these days to put in any claim for compensation. The greater part, if not the whole, of them took the coif for the precedence that it gives them on circuit. That precedence they would still retain. None but two or three favourite leaders do any business worth speaking of in town, and they, it is understood, would willingly consent to have the Court opened, on condition of being allowed to practise in the Court of King's Bench, which, by the etiquette of the profession, they are at present precluded from doing.

The Court of Exchequer however stands more in need of reform

(b) Miller's Inquiry into the present state of the Civil Law of England, p. 24.

than the Common Pleas. It is at present by far the most inefficient of all the courts of Westminster Hall. During term, the King's Bench always sits at least six hours a day, and the Common Pleas generally three; while the Exchequer is seldom occupied above an hour or an hour and a half. It is true that the Lord Chief Baron also sits apart three or four days in the week to hear causes in equity; but that is no reason why the other three judges, who have power to proceed without him, should be doing nothing. The causes which render the Exchequer inoperative as a court of law are, except as regards the capacity of the judges, distinct from those which affect it as a court of equity. It will, therefore, be more convenient to notice them separately.

The common law side of the Exchequer is not, like the Common Pleas, open only to a limited number of advocates; but it is subject to a monopoly still more injurious. No action can be prosecuted or defended in the Court of Exchequer, except by one of the sworn attorneys in the Office of Pleas in the Court, or by an officer called a clerk in court, in the name of one of the sworn attorneys. There are four sworn attorneys, and sixteen clerks in court. By one of these privileged individuals must the business of every suitor be conducted. The consequence is that no person, unless he is a client of one of these four attorneys or sixteen clerks in court, or of a country attorney for whom they act as agents, ever brings an action in the Court of Exchequer. It is true that these clerks in court will act as agents for other attorneys for half fees, but no attorney will of his own accord bring an action for his client in that Court where his own profit will only be half what it would be in any other; few clients ever interfere themselves in the choice of the court in which their actions are to be brought, and fewer still would think it prudent to act in opposition to their attorney's advice. Where, indeed, these clerks in court happen to act as town agents for country attorneys, it is all the same to the attorney in which court the action is brought, as he would have to allow his agent half the profits in any case; but the number of clerks in court is so small, that this circumstance need hardly be taken into account.

The effects of such a system are exactly what might be expected. The civil business of the law side of the Court of Exchequer is next to nothing. It is difficult to ascertain precisely the actual quantity of business done by the different courts of law, as there is no way of knowing in which court the actions tried on the circuit are commenced. The following table, however, extracted from the Parliamentary Returns, will enable us to judge of the *comparative* quantity brought before each court. It shows the number of civil causes entered for trial in the Courts of King's Bench and Common Pleas, and on the common law side of the

Court of Exchequer, for the four years preceeding 1825, the last period for which the returns of all these courts have been made :

Year.	King's Bench.	Common Pleas.	Exchequer.
1821	1495	508	60
1822	1651	470	66
1823	1470	445	49
1824	1635	472	73

It may be objected that this table does not include the crown cases brought before the Court of Exchequer, nor the business done on the equity side ; to this it might be replied, that only the civil cases taken to the Court of King's Bench are given, and that the other matters brought before that Court are more than equal to the crown and equity business of the Exchequer : but, for our present purpose, the objection is quite immaterial. It will not be denied that the King's Bench has more business brought before it than it can dispose of, and that the Court of Exchequer could do four times as much as it does at present, including the crown and equity business. Some of the business of the King's Bench cannot be brought to the Exchequer, but the civil cases can. While, therefore, there were any arrears in the Court of King's Bench all the civil cases would necessarily be taken to the other courts, where there were no arrears, if there was not some fault in their constitution or practice. That such is the fact then is clearly shown by the table above given, by which it appears that twenty-five times as many causes are taken to the King's Bench, which has not sufficient time to hear them, as are taken to the Exchequer, where they would be immediately tried and decided.

The remedy, which we should propose for this evil, would be simply to abolish the exclusive privileges of the sworn attorneys and clerks in court, and to permit all attorneys to practise in the Exchequer in the same way that they practise in the King's Bench and Common Pleas. On doing this, it would be necessary to give a compensation to the present attorneys and clerks in court for loss which they would sustain by the abolition of their offices. This would not, however, amount to any large sum ; and we understand that the attorneys have signified that they would not oppose its being raised by an additional duty upon the annual certificates of such of them as might be desirous of practising in the Court of Exchequer, if the government should refuse to accede to the measure on other terms. (c) We, however, are of opinion that

(c) A petition to this effect has, of the most respectable London attorneys, actually been presented to Mr. Peel by a large body

an expense of this description ought to be borne by the country at large, and not by those only who are compelled to have recourse to law, upon whom a tax on attorneys must ultimately fall; as we consider that the proper administration of justice is one of the first purposes to which the national funds ought to be applied.

The Exchequer derives its equity jurisdiction from its having exclusive cognizance over all matters connected with the revenues of the crown. The primary and original business of the equity side of the Court was to call the king's debtors to account by bill filed by the Attorney-General. As, however, the officers of all the courts have the privilege of suing and being sued only in their own court, so the king's accomptants and debtors were privileged to sue all persons in the same court of equity that they were themselves called into. Afterwards all other persons were permitted to sue in the court on making a fictitious suggestion in their bill that they were debtors and accomptants to the king. This suggestion was not allowed to be contradicted. It is now even not considered necessary, and the Court will not suffer its general jurisdiction as a Court of Equity to be questioned.

The Court of Equity of the Exchequer is held in the Exchequer Chamber, and is supposed to be held before the Chancellor of the Exchequer and the four barons. The Chancellor, however, in fact never attends, unless when the barons are equally divided in opinion. The last instance which happened of the Chancellor's sitting in judgment was in the case of *Naish v. the East India Company*, in 1735, when Sir Robert Walpole was Chancellor. Before the Act of the 57 Geo. 3, c. 18, equity causes were heard before all the judges of the Court, who for that purpose adjourned out of their ordinary court into the adjoining Court of the Exchequer Chamber. All motions, however, and other interlocutory matters were heard in the ordinary court. As there were never more than two out of the four judges who were equity lawyers, two of the barons were not of much assistance in hearing equity causes (d); but although they might have absented themselves, as in fact they frequently did, they were not able to hear any other business while the Court was sitting in the Exchequer chamber. This evil was in part remedied by the Act of the 57 Geo. 3, c. 18, by which the Lord Chief Baron was authorized to hear and determine equity causes sitting alone, while the other barons continued to dispatch the ordinary business of the Court. By some absurd inadvertency the act was so framed that it has been held to give no authority to the Chief Baron to hear many kinds of inter-

(d) At present there is not even one equity lawyer among the puisne barons of the Exchequer.

locutory proceedings, which must still be heard before the barons sitting in the outer court, who are generally common lawyers, entirely ignorant of equity, and equity practice.

This act, however, rendered the Exchequer a more efficient court of equity than it was before. But still it has only remedied a small part of the evil. The Chief Baron though enabled to hear causes alone while in town, is still absent from London on the circuit with the other barons nearly three months of the year. During that time the Court of Exchequer is entirely shut up. This is the great defect in the Court. There is such a constant necessity for repeated interlocutory applications in the progress of a suit in equity, for injunctions, for the appointment of a receiver, for payment of money into or out of court, and other similar purposes, all of which are delayed in the Exchequer during the absence of the barons on circuit, that very few suits will ever be carried to the Exchequer while it is constituted as it is at present. Only 47 causes, we believe, were set down for hearing during the whole of last year. The only remedy for this is, to follow up the Act of the 57 Geo. 3, by entirely separating the equity from the common law side of the Court, and to appoint another judge who should be constantly sitting in equity. The plan which has been suggested and to which we cannot see any objection, is to create a Vice-chancellor of the Exchequer, who shall sit alone in equity during the whole year; leaving to the Lord Chief Baron and the other Barons the common law and revenue business, and the duty of going the circuits (e).

This measure would at once, without any great or striking change in our judicial system, which is so much dreaded by many persons, furnish an additional efficient Equity Court regularly sitting. That such a court is wanted is sufficiently proved by the present state of the business in the Court of Chancery. Of causes waiting either for an original hearing, or hearing after a reference to the Master, there is at the present time an arrear of 530 before the Vice-chancellor, and 250 before the Master of the Rolls. The Lord Chancellor now hears causes only on appeal from these two judges, and there is an arrear of about 120 of these appeals before him. There is also a large number of causes waiting for judgment, and an arrear of pleas and demurrers. It is admitted on all hands that these arrears could not be disposed of in the Court of Chancery as at present constituted under many years, even supposing no new business was brought before it. To increase the number of the judges of the Court of Chancery would not how-

(e) It might perhaps be better to make the Chancellor of the Exchequer what, as his name purports he

originally was, a judicial officer, and to give the finance business of the government to some other minister.

ever remedy the evil, unless a similar increase was made in the number of the subordinate officers. The delays are greater in the Masters' offices than in any other branch of the Court; and the registrars are so overwhelmed with business, that it is often several months after a decree has been pronounced before a copy of it can be obtained from their office. In the Court of Exchequer, on the contrary, we find a complete set of officers without any thing to do—The whole machinery of a Court of Equity waiting for employment. Besides the additional judge, it would not be necessary, we believe, to appoint a single officer, except perhaps a registrar to attend in court and take minutes of the decrees, which the Masters, who do that duty at present, would then by their other avocations be prevented from doing. Six or seven thousand pounds a year would cover the whole expense of the proposed alteration; a sum quite insignificant in comparison with the benefit to be gained from the measure.

The appointment of an additional equity judge to the Exchequer would also be of very great advantage in another respect. The Chief Baron might then be taken from the common law instead of the equity bar. By this the Exchequer would be greatly improved as a court of law, and the administration of justice on the circuits, and at the Old Bailey, would be benefited. It is by the Chief Baron that all actions brought in the Exchequer in London and Westminster are tried, and he goes the circuits, and sits in the criminal court at the Old Bailey, in the same manner as the other eleven judges. Now, however capable an equity lawyer may be of deciding upon points of common law, when he has sufficient time given to him to form his opinion upon them, and if necessary to consult his books, he will rarely be able to decide off hand upon the numerous questions of evidence and pleading, which are constantly arising in the progress of a cause at *nisi prius*, and in the criminal courts. These questions are wholly foreign to his former education and practice. He is nevertheless called upon to decide them instantly without any time for consideration, or reference to authorities. This has been one of the circumstances that has tended to bring the Exchequer into disrepute as a court of law, and even the opening of the Court in the manner we have before suggested would not be enough to render it efficient, without a change also in this respect.

We have now endeavoured to point out what we conceive to be the peculiar defects of the Courts of Common Pleas and Exchequer, and the manner in which those defects might be remedied, so far at least as to put these Courts on an equal footing with the others. Farther than this we have not attempted. Our object has been only to show in what manner these Courts, which are at present comparatively inoperative, might be enabled to relieve the King's Bench and Chancery, and particularly the latter, from a

part of the accumulated load of business with which they are incumbered, and which renders them at present quite unable to hear and decide the matters brought before them with that deliberation and dispatch which the suitors have a right to expect.

In order to ensure a more equal partition of business among the several courts, it has also been proposed to divide the subjects of jurisdiction among them, and to assign particular matters to each; as for instance, to give to the Exchequer all questions relative to tithes, charities, and benefit societies, in which the Court of Chancery has now concurrent jurisdiction. We, however, are very averse to any proposition to divide the law into a great many separate branches, to be administered by different jurisdictions. We have already too many such divisions; and the incompetence of judges to decide upon points of law, which are not thought to fall within their peculiar jurisdiction, often leads to the greatest inconvenience.

Before we conclude, we should observe, that a slight discussion took place in the House of Commons upon the Courts of Common Pleas and Exchequer, in the debate upon the judges' salaries in the year 1825. In the course of the discussion Dr. Lushington and Mr. John Williams alluded to the present inefficient state of these Courts, and insisted upon the necessity of opening the one to the bar, and the other to the attornies. Mr. Peel in the course of his speech in the same debate said, "that he looked with favour upon some of the propositions of the member for Ilchester (Dr. Lushington), particularly upon that of throwing open the Court of Exchequer to all attornies. Whether it would be equally right to throw open the Court of Common Pleas to all the rank and file of the profession, he would not at that moment pretend to determine; it was a question of some importance, and required greater consideration than he had yet given it." We hope that since that time consideration has been given to the subject, and that the present session will not pass without some measures being taken to remedy the evils complained of.

ART. VIII.—WAGER OF LAW.

Reports of Cases argued and determined in the Court of King's Bench, in Hilary Term, 1824. By Richard Vaughan Barnewall, of Lincoln's-Inn, and Cresswell Cresswell, of the Inner Temple, Esqrs., Barristers-at-Law. London, 1824.

THERE is a charm in antiquity, the force of which we all feel and acknowledge. It lends an additional value to many of those things that we esteem the highest. We love an old friend, a bottle of old wine, an old coin, an old picture, an old statue, an old

fiddle, an old manuscript, an old book; and persons have been known to be enamoured of old mistresses, as Henry II, of France, and Louis XIV; but this taste has never become general. To the same latent virtue we are probably to attribute the strong attachment of the English to old laws and institutions; and hence the zeal of our legal writers to trace back all that is valuable in both to the remotest period. We cling with tenfold affection to the institutions that can boast the dignity of barbarian origin; and blessed is the man who can prove to our satisfaction that we are living under laws framed by the philosophy of our half-clad German ancestors in the contemplative retirement of their bogs and fastnesses.

The persevering efforts of the learned, to show that we are indebted to the wisdom of the dark ages for our Trial by Jury, are well known. The attempt was laudable, although not quite successful. But if the pedigree of juries be involved in some doubt, there are other judicial forms, the claims of which to Teutonic origin may be established without even the aid of strained interpretation, or far-fetched surmise. Of this number is Wager of Law, or Trial by Compurgation; a species of trial which, as it appears from the Reports of Messrs. Barnewall and Cresswell, still maintains its ground in our courts, although modern evasions have almost driven it into oblivion. In an action of debt on simple contract (*a*), the defendant pleaded *nil debet per legem*; and the Master having appointed a day for the defendant to come into Court with his compurgators, counsel applied to the Court to assign the number of compurgators, with whom the defendant should come to perfect his law. The Court, however, refused to give the defendant any assistance, and left it to him to bring such number of compurgators as he should be advised were sufficient, subject to the objections of the plaintiff. The defendant prepared to bring eleven compurgators, but the plaintiff abandoned the action. As some uncertainty seems to have existed in this case with regard to the correct mode of proceeding, we shall endeavour to clear up a point of so much importance; but first we shall give a short history of the venerable institution itself.

Trial by compurgation was in general use among the northern tribes that overran the Roman empire; it was one of many expedients for eliciting truth which prevailed in an age rather remarkable for active energy, than for intellectual acuteness and subtle distinctions. In those days religion was not unfrequently called in aid of law:—in modern times law is but too often called to the assistance of religion. Repeated mention is made of trial by compurgation in the codes of the northern nations, in old

(*a*) King v. Williams, 2 B. and C. 538.

charters, and in the earlier historians. It is called *juramentum* or *sacramentum*, and the compurgators are termed *juratores*, *conjuratores*, *sacramentales*, *consacramentales*, *juramentales*, *collaudantes*, *purgatores*, *compurgatores*, &c. The person who adopted this mode of defence was said *sacramentum præbere*; *cum suis legitimis sacramentalibus se purificare*; *per sacramentum se defendere*; *cum sacramento se purgare*; *jurare*, &c. Mr. Spence, in his valuable work upon the Origin of the Laws and Institutions of Modern Europe, observes, that "the system of compurgation, so far as putting the party himself to his oath, evidently had its origin from the decisory oath of the Romans;" (b) which is as much as to say, that there was nothing wanting to a system of *compurgation* in the Roman law except—*compurgators*. In the same spirit we might assert, that the system of trial by jury, so far as regards judge and witnesses, evidently had its origin in the proceedings before a Turkish Cadi. "There is a river in Macedon, and there is also moreover a river at Monmouth, and there is salmons in both." The fact is, that scarcely a single instance occurs in the whole of the barbarian codes, where the decision of any question was left to the unsupported oath of either of the parties. Sometimes, indeed, but very rarely, such a power was granted as a special personal or local privilege, as in the *Charta Libertatum Oppidi Cellarum in Biturig.* an. 1216. "*Si aliquis hominum Cellensium accusatus de aliquo fuerit, et teste comprobari non poterit, contra probationem impetentis per solam manum suam deculpabit.*" But the decisory oath itself differed most materially from the oath of purgation; the former was tendered by one of the parties to the other, as the means of abridging a civil suit; the latter was prescribed by the law as a specific defence to a criminal charge or a civil claim. Mr. Spence lays much stress upon the eleventh title of the code of the Frisons, in which it was provided that, where a man claimed another for his slave, either party might assert his right by his own oath, and the oaths of a certain number of cojurors, or might tender the oath on the same terms to his adversary. If this provision had appeared in the codes of the Bavarians, the Alemans, the Ripuarians, or in the Capitularies, in which there are a few solitary traces of the influence of the Roman law, there might, perhaps, have been a *shadow* of a reason for supposing that the institution in question originated in the decisory oath. But unhappily, in the code of the Frisons, not a vestige of the Roman law is discoverable. (c) It will be recollected moreover that an oath is

(b) An Inquiry into the Origin of the Laws and Political Institutions of Modern Europe, p. 468.

(c) See Savigny, *Gesch. des Röm. Rechts im Mittelalter*, b. ii.

prescribed by the law of Moses in a particular case, to which the oath of purgation bears a much stronger likeness than it does to the *sacramentum decisionis* of the Romans. "If a man deliver unto his neighbour an ass, or an ox, or a sheep, or any beast to keep, and it die, or be hurt, or driven away, no man seeing it, then shall an oath of the Lord be between them both, that he hath not put his hand unto his neighbour's goods; and the owner of it shall accept thereof, and he shall not make it good." (d) It is by no means necessary, however, to assume that the Germans borrowed their institution from any other people; and we may be pardoned for saying, that few errors are more fatal to the dignity and utility of historical and philosophical inquiry, than the habit of arguing rashly upon those fortuitous traits of resemblance, which so constantly occur in the manners and laws of different nations.

But to resume. The number of compurgators varied considerably, according to the importance of the subject, the character of the person, or the customs of the particular people. In Wales there was a species of purgation, denominated Assath, existing at the beginning of the fifteenth century, in which the number of compurgators amounted to 300. Thus, in 1 Hen. 5, c. 6, which abolished the custom; "Ils vorront se excuser per un assath selonque la custume de Gales; c'est à dire, per le serement de 300 homines." Twelve, however, appears to have been the most usual number, including the party himself; this was termed *jurare duodecima manu*; the examples are innumerable. (e) The number twelve is the only one to be found in the Lib. Feud. 1, tit. 4, 10, 26, 28; it is also recognized in the laws of Edward the Confessor, which were confirmed by William the Conqueror (apud Seld. ad Eadmer. Ll. 4, 16, 17)—"Si jurat sei dudzime main." In the laws of Hoel Dda it is observable that a woman, in the case of any imputation being cast upon her chastity, was obliged to vindicate her character by the oaths of women; in all other cases, by the oaths of men. (f) There are some other peculiarities in the provisions of the same code with respect to compurgation. In lib. ii. c. 6, it is enacted that the compurgators should be related to the party in such a degree as would entitle them to receive his *weregild*, or render them liable to assist him in paying a *weregild*,—*multam pro cæde cum illo solvere, vel pro illo accipere idonei*. In lib. ii. c. 10, it is also provided, that where the compurgators are "*tenuis conditionis*," they shall swear that they believe that what the accused has sworn is true,—*se credere juramentum hominis esse verum*; and that, in this

(d) Exodus xxii. 10.

(f) Lib. ii. c. 2, ss. 70, 92, 95.

(e) See Du Cange, voc. Juramentum.

case, if one of the number declines swearing, the oaths of the rest shall be of no avail; but that where the compurgators are *ingenui*, they may swear that the statement of the accused appears to them the most probable,—*sibi verisimilius videri id quod reus juraverit*; in which case, although a third of the number refuse to swear, the oaths of the remaining two-thirds shall prevail.

In these two regulations of Hoel the Good, Clarke (g) thinks that he can discern the origin of the distinction made by our law between the grand and the petty jury, requiring unanimity in the one, and dispensing with it in the other; which only proves upon what a slender foundation a learned man can build an hypothesis. It is clear, in the first place, that the two methods of compurgation are not mentioned as separate parts of one legal proceeding, but as distinct trials; in the second place, the number of compurgators produced in each is *the same*; and in the third place, the distinction in the laws of Wales evidently arises from the different rank of the compurgators. But Barrington, (h) either conceiving that Clarke had not gone far enough, or mistaking his meaning, actually asserts, upon the authority of the above passages, that trial by jury “was in use amongst the Welsh,” although the word *compurgatores* stared him in the face, and although he had sufficient evidence in the laws of his own country that “trial by jury” and “trial by compurgation” were by no means convertible terms.

The ceremony of compurgation is thus described in the code of the Al-mans, tit. 6, s. 7. “*Ista sacramenta debent esse jurata, ut illi conjuratores manus suas super capsam (i. e. the reliquacy) ponant, et ille solus cui causa requiritur verba tantum dicat, et super omnium manus manum suam ponat, ut sic ei Deus adjuvet vel illæ reliquæ ad illas manus quas comprehensas habet, ut de illa causa unde interpellatus est culpabilis non sit.*” This form serves to explain the expression “*jurare manu.*” The party swore to the fact; the compurgators to his credibility.

Upon a superficial view of the subject it might seem, that the custom of compurgation was calculated to prevent the perjury which would have ensued, if the decision of a question had been left to the oath of the accused alone. But when we consider that at the period when it generally prevailed, the ties of consanguinity and clanship were regarded as superior to all other obligations, we shall find that the security was rather apparent than real. It cannot, therefore, surprise us that the complaints of the prevalence of false-swearing were universal; and we know from Leg. Longobard.

(g) Præfat. ad Leg. Hoeli Boni.

(h) Observations on the Statutes, p. 19.

2, 55, 34, that the frequency of perjury was the principal reason that induced the Emperor Otho II, with the advice of Conrad of Burgundy, and all the princes of Italy, to restore the judicial combat, which had been discouraged, if not abolished, by his predecessors.

Trial by compurgation, thus respectable in its origin, became the inheritance of the English; and they have preserved it to the present moment, with that jealous affection and filial reverence, which have converted our code into a species of museum of antiquities and legal curiosities. The number of compurgators required by the law of England is *eleven*, making up, with the party himself, the *duodecima manus* already mentioned. This number is established by the testimony of Glanvil, lib. i, c. 9, Bracton, lib. v, c. 13, and the writer of the treatise, entitled "*Diversite des Courtes*," fol. 119 (ed. 1561). Fleta indeed states that *eleven* is the greatest number required by the law; but that no more need be sworn than twice the number of the *secta* produced by the plaintiff:—"Sed si sectam produxerit, hoc est, testimonium hominum legalium qui contractui inter eos habito interfuerint præsentes, qui a iudice examinati, si concordēs inveniuntur, tunc poterit vadiare legem suam contra petentem et contra sectam suam prolatum: ut si duos vel tres testes produxerit ad probandum, oportet quod defensio fiat per quatuor vel per sex; ita quod pro quolibet teste duos producat juratores, usque ad duodecim (i)." But as the custom of producing the *secta* has long ceased, the number *eleven* is the proper number in all cases. It is probably with reference to the production of the *secta* that the author of the "*Termes de la Ley*," p. 425, states, that "when one shall wage his law, he shall bring with him 6, 8, or 12 of his neighbours, as the Court shall assign him, to swear with him." In another part of the same page, he states 12 absolutely to be the number. In Style's Practical Register, there is a most ludicrous blunder relative to the expression *jurare manu*:—"The manner of waging of law is this, he that is to do it, must do it *duodena manu*, viz. he must bring *six* compurgators with him." It so happens, that numerous instances are to be found of the phrases *jurare tertiâ, quintâ, septimâ, undecimâ manu* (k). The learned author of the Practical Register might possibly imagine that in these cases there must have been some *one-handed* man in the company.

In an anonymous case reported by Salkeld (l), the form of waging law is described as follows:—"The defendant was set at

(i) Lib. ii. c. 63, s. 10.

(l) Salk. ii. 682. Trin. t. 11.

(k) See Du Cange, voc. Jura-mentum.

the right corner of the bar, without the bar, and the secondary asked him if he was ready to wage his law? He answered, yes; then he laid his hand upon the book; then the Court admonished him, and also his compurgators, which they regarded not so much as to desist from it; accordingly the defendant was sworn that he owed not the money *modo et forma*, as the plaintiff had declared, nor any penny thereof. Then his compurgators standing behind him, were called over, and each held up his right hand, and then laid their hands upon the book and swore, that they believed what the defendant swore was true."

Style observes, in his Practical Register, that "the wager of law was most practised in those times that craft, subtilty, and knavery had not got firm footing in the nation; but it being abused by the iniquity of the people, the law was forced to find out another way to do justice to the nation." But perhaps our readers may be of opinion that there is a principle in our nature, the same at Kamschatcka as in England, the same under William the Conqueror as under George the Fourth, by which oaths sown in abundance will invariably produce a plentiful crop of perjuries:—

Tam facile et pronum est superos contemnere testes,
Si mortalis idem nemo sciat.

ART. IX.—FRENCH LAW OF LITERARY PROPERTY.

*Rapport de la Commission chargée de préparer un Projet de Loi
sur la Propriété Littéraire. Paris 1826.*

GREAT difference of opinion has prevailed respecting the property which it is expedient to give to an author in his literary compositions. Some few persons, indeed, have gone so far as to contend that it was for the advantage of literature and science that no exclusive property whatever should exist in works after they had once been given to the world by publication. (a) But we may safely say that this opinion has been long since refuted and exploded, and that it is now universally admitted that the same principle of general utility to society, upon which are founded all other rights of property, requires that authors and artists should have an exclusive right of property, for some period at least, in the productions of their own minds. The only question now is, for what period and under what conditions it should be given. We accordingly find that this description of property is now recognized

(a) The celebrated speech of Lord Camden to this effect, in the discussion of the Copyright Bill in the last reign, is well known.

and secured by the laws of all civilized nations, although there exists a very considerable difference in the term for which it is allowed to continue, and the privileges which it confers upon the proprietor in the laws of different countries.

In this country, considerable alterations have taken place in the law from time to time in this respect. At first the copyright was only given to the author for fourteen years. It was afterwards provided that if the author should be living at the end of that time, the right should then return to him for another term of the same duration. Finally the Statute 54 Geo. 3, c. 156, has given to the author and his assigns, the sole liberty of printing and reprinting his works for the term of twenty-eight years, from the day of the first publication, and if the author be living at the end of that period, then for the residue of his life. Musical compositions have been held to be within the meaning of the law so far as regards their publication. (b) But no privilege has yet been given to authors either of literary works or musical compositions, as regards their representation on the stage; and it has accordingly been several times decided by our courts, that dramatic works may be represented without the permission of the author, and consequently without his being entitled to any share in the profits arising from their representation. (c) A copyright has been given to the inventors of prints and engravings for the term of twenty-eight years, by the statutes 8 Geo. 2, c. 13, and 17 Geo. 3, c. 38. But this protection does not extend to the painter or artist of the original picture or design; and even where the engraving has been made by the painter himself from his own picture, any other person may make a fresh engraving from the original picture, provided he does not copy the former print. (d) An act of the 54 Geo. 3, c. 56, has however placed the sculptor in a better situation than the painter, as it vests in the *maker* the sole right and property of all new and original sculpture for fourteen years, to be renewed for another fourteen years, if the party be living at the end of the first term.

This short sketch of the law is quite sufficient to show how imperfect and inconsistent it is, and how much it stands in need of improvement. The law of France on this subject is far better in many respects. The proprietor of a copyright in a work is protected from piracy by representation, as well as from piracy by publication; and painters, sculptors, and engravers, are all placed on the same footing as authors of literary works. The

(b) In the case of *Back v. Longman*, 2 Cowper's Reports, p. 623.

(c) This was decided in the case of *Coleman v. Watkins*, 5 Term Reports, p. 245, and subsequently in

the case of *Murray v. Elliston*. 5 Barnewall and Alderson's Reports, p. 657.

(d) See the case of *De Berenger v. Whebbe*, 2 Starkie's Reports, p. 548.

progress of the law, however, has been the same in France as in this country. The protection afforded by the law to literature and the arts has been increased in proportion as their value has been felt and appreciated. Prior to the year 1777, literary property does not appear to have been recognised by the French laws. An exclusive licence or privilege to print and sell a particular work for a certain period was often granted to the bookseller who had become the proprietor of the manuscript; and a similar licence was sometimes granted to an author in his own name; but no general right of property in literary works was in any manner secured or recognised by the law. A royal decree, of the 30th July, 1777, for the regulation of the book trade, for the first time conferred a legal existence on this species of property, by giving to the *author* of a work the power of obtaining the exclusive privilege of publishing and selling it, and by declaring "that every author who should obtain this privilege should enjoy it to him and his heirs for ever, provided that he did not assign it to any bookseller; in which case the duration of the privilege should, by the act of assignment, be limited to the life of the author." The law remained in this state until the Revolution, when, owing to the word *privilege* having been used in the decree of 1777, literary property was deprived of legal protection by the celebrated decree made by the National Assembly on the night of the 4th August, 1790, by which *privileges* of every description were abolished. This injustice was remedied, however, so far as regarded the representation of dramatic works, by a law of the 13th January in the following year, by which it was declared, "that the works of living authors should not be represented in any public theatre without the written consent of the authors; and that the heirs and assigns of an author should have a similar property in his works for five years after his death." And the National Convention, two years afterwards, on the report of the Committee of Public Education, made a decree for the general protection of literary property; which, with the alterations mentioned below, forms the present law of France upon the subject. By this decree, which was made on the 19th July, 1793, it was declared, "that authors of works of every description, composers of music, painters, and engravers, should enjoy during their lives the exclusive right of selling, causing to be sold, or distributing their works, within the territory of the Republic, and of assigning their property in them, either in whole or in part; and that their heirs or assigns should enjoy the same right for the term of ten years after their death." A subsequent law gave the proprietor of a posthumous work the same rights as if he had been the author of it. And by an imperial decree of the 5th February, 1810, the author's copyright was further continued to his widow, if she survived him, for life,

and to their children for twenty years after the death of the survivor. No alteration has been subsequently made in the law upon this subject. The code only fixes the punishment for the infringement of a copyright, leaving the former laws in all other respects in force.

It will be at once seen that, besides being more consistent, the French law confers much greater privileges upon authors and artists than the law of this country. These privileges have not been found to be prejudicial to the advancement of literature and art; on the contrary, they are universally acknowledged in France to have been most favourable to their progress; and the public voice has for some time actually demanded a further extension of the term for which an author's property in his works is secured to him and his family. The circumstance of the descendants of some of their greatest writers having become reduced to solicit charity, while the works of their ancestors were being constantly re-published and represented on the stage, as public property, excited attention to the state of the law relative to literary property. Considerable discussion took place upon the subject; and finally a commission was appointed by the King to frame a new law, to be submitted to the legislature, for the further protection of literature and the fine arts.

This commission was composed of the Viscomte de la Rochefoucault, Chief of the Department of the Fine Arts, President, and of twenty-two other members, consisting of Peers, Deputies, Members of the Council of State, and Members of the Institute. There were afterwards added to it four literary men, who were chosen by the dramatic authors to represent their interests, and two booksellers, delegated by the other members of their trade, for the same purpose. The Commission met for the first time on the 12th December, 1825, and closed its sittings in the middle of last year. The subject of literary property was very fully discussed by the members. They set out by admitting the principle of the perpetual and exclusive right of authors, their heirs, and assigns, to their works; but when they came to look for the means of carrying this right into effect, they were obliged to renounce the idea. They then named eighty years as the period during which the property in a work should be vested in an author and his heirs. This period, however, on further discussion, appeared too long; and it was accordingly reduced to the term of the author's life, and fifty years to commence from his death. The Commission has since made a Report to that effect, and has prepared the draft of a law, conformable to the suggestions of the Report, to be submitted to the Legislature. As the subject is one of a highly interesting nature, and as the greater part, if not the whole, of the alterations proposed by the French

Commission might be adopted with advantage in this country, we think we cannot do better than lay before our readers a copy of the Report and proposed law.

REPORT.

"SIRE,

"Pursuant to the orders of your Majesty, the Commission, to whom has been confided the drawing up of a law for the protection of literature and the fine arts, has met several times. The first feeling, Sire, of the men of letters and artists summoned to this work, has been that of gratitude for the generous intentions of a Monarch, who is desirous of protecting the productions of the mind, as well by positive laws as by his own personal favour; they have felt that this protection is the most lasting and noble benefit that could be conferred. Filled with respect for this act of royal justice and munificence, all the members of the Commission have endeavoured to show themselves worthy of it by framing, with the most scrupulous care, a law, which, while favourable to authors and to artists, should at the same time not be hostile to the interests of the public and of trade.

"Such, Sire, has been the end which the Commission has proposed to itself, in framing the law which it has the honour to submit to your Majesty. The present laws, formed by various successive decrees, secure to the author the property of his works during his life-time, but limit the right of his heirs to ten or twenty years after his death, according as they may be, in a collateral or direct line. It has appeared to the members of the Commission that this term is too short, and this distinction between the different kinds of heirs but little conformable to justice. Would it however be possible, in abolishing entirely this distinction between the lineal and collateral branches, to give an unlimited right of succession to all the heirs of an author; that is to say, to render property in a literary work entirely similar to that in a field, or in an estate? Such an unlimited privilege exists no where; it would obstruct the diffusion of knowledge by too long a monopoly; it would become either burthensome to the public, or of no value to the family; and it would frequently disappoint the intentions of the author himself, who, in publishing his work, might have wished that editions should be multiplied with facility after his death. It has, therefore, been considered, Sire, that the present period of exclusive copy-right ought to be extended, but that it nevertheless ought to be confined within definite limits.

"The term of fifty years has appeared sufficient, both to ameliorate considerably the condition of the heirs, and to facilitate any advantageous disposition of his works which the author himself might be desirous of making during his life. This period also renders it practicable to simplify the existing laws relative to the right which the widow enjoys during her life, when not restricted by her marriage contract. In the new system the right of the widow will be included in the fifty years granted to the heirs, and the unlimited right of the public will always commence after this fixed and uniform period. One case alone is excepted, that, in which the heirs of an author have not printed his work for the space of twenty years.

"The author himself will have the power of alienating the right of his heirs in the same manner that he can alienate any other property. In this case the property of the grantee will last for fifty years after the death of the author. The same privilege will exist for the publication of posthumous works, and for collections published by learned societies.

"Such is, Sire, the first title of the proposed law. The regulation

which it contains are the most favourable that have ever existed in any country, for authors and their families. They will encourage men of talent to compose great and serious works by the certainty that their families will possess in them for a long time an honourable patrimony.

"Dramatic works required a special regulation. They have in fact a double existence, that of representation and that of publication. In the latter point of view they belong to the class of other writings; but, as regards representation, it at first seems possible to give to the author and his heirs more than a temporary right. Here, in fact, the privilege of the author and his family would not cease for the benefit of the public, but would terminate only for the benefit of the theatres. Would it then not be just to prolong this right, and to attach it, as it were, to all the posterity of an author? But this regulation would bring with it all the consequences of a right excepted from the general law; and it would then be necessary to make the dramatic property of an author unalienable, and to entail it in the direct line. This, however, would restrict the author in the exercise of his own rights. If, on the other hand, this hereditary and unlimited privilege were transferrable by alienation, it would afford no secure provision for the author's family, and the descendants of a great poet might live in indigence by the side of a speculator enriched by their spoil. The Commission, therefore, has thought it better not to deviate from the common rule, but to render the law uniform, by limiting to fifty years, for representation as well as for publication, the exclusive right of the heirs of a dramatic author, and by leaving to the author himself the power of disposing of it.

"The productions of the fine arts are the subject of a separate title in the proposed law. The painter who procures his design to be engraved, and the sculptor who has a cast taken from his work, alone will have the right of multiplying the copies. This right will be transmissible to their heirs in the same manner as that in scientific and literary works. It has been considered that this protection might be granted by the law without any inconvenience. Inferior productions will not profit by it, and productions of real merit are worthy of it.

"No difficulty presented itself with respect to musical works: as regards both representation and publication, they fall necessarily under the rules already fixed for literary works.

"As the succession to an author's work may often be an object of considerable importance, it was necessary to determine the rights of the state in case of the failure of heirs. The solution of this question was not difficult in a law, the sole object of which was the protection of literature. It has, therefore, been thought that the state ought to give up its claim in favour of public competition, without prejudice however to the rights of the creditors of the author.

"To conclude, *Sire*, the benefit of a law emanating from your initiative power would not be complete, if the application of it were to be postponed to some distant period, and did not immediately come to the assistance of those whose rights are not yet expired. It has, therefore, seemed fit, *Sire*, that the law, at whatever time it should be presented, should apply to the then existing state of things, that it should leave to the public all works which should then have reverted to it, and should prolong the property of those authors, families, and grantees, only, whose right should be still in force under the existing laws. This regulation which was necessary to render the proposed law complete, might offer some legal difficulties in its application. The commission has endeavoured to solve them in the

double interest of the authors and their grantees, by dividing between them, as it were, the benefit of the law.

"As the proposed law creates no new offence, but only gives a new extension to a property already recognized and protected by the existing laws, no penal sanction has been considered necessary.

"Such, Sire, is the general view of a law, the object of which is to realize an intention originating with your Majesty. The members of the Commission, who have applied themselves to the discussion of this work with as much minute attention as ardour, will be happy if the result of their labours shall appear worthy to promote the generous views of your Majesty, and to carry into effect your benevolent intentions towards literature and the fine arts."

DRAFT OF THE LAW VOTED BY THE COMMISSION.

"FIRST TITLE.

"Of the Publication of Writings by Means of Printing, Engraving, or Lithography.

"Art. I. The exclusive right to publish, or permit the publication of a work by means of printing, engraving, or lithography, is secured to the author during his life.

"II. After the death of the author, the exclusive right of publishing, or permitting the publication of a work, shall last for fifty years in favour of his widow, heirs, legatees, or donees;—the whole conformable to the rules of the civil law.

"III. The extension granted by Art. II. shall not take place, except subject to the obligation of reprinting within twenty years from the death of the author.

"IV. The proprietor, by inheritance, or any other means, of a posthumous work shall enjoy, during fifty years, the exclusive right to publish, or permit the publication of it.

"V. The author may sell the exclusive right of publishing his works, either for the whole period granted to him and his heirs by the above articles, or for a shorter period.

"In the latter case, his heirs shall enjoy the copyright during the period for which he has not disposed of it.

"VI. The exclusive right of the state to works composed by its order and at its expense, and that of academies and learned bodies legally established to works published under their directions, shall last for fifty years, to date from the first edition.

"The present article shall be without prejudice to the rules generally adopted by academies, which secure individually to each of their members the separate property in works which they have furnished to the collection.

"SECOND TITLE.

"Of the Right of Authors of Dramatic Works.

"VII. It shall not be lawful to represent on any theatre the dramatic works of living authors without their consent.

"VIII. Contracts between authors and managers of theatres shall continue to be free. No authority shall have the power to fix the allowance, or to raise or diminish the price agreed upon between them. The benefit reserved to the author shall not be liable to be seized or attached by the creditors of the theatre.

"IX. After the decease of the author every theatre duly authorized shall have liberty to represent his works upon paying to his widow, heirs, legatees, or donees a recompence equal to that which he received at the time of his decease.

"This recompence shall last for fifty years.

"X. As regards the printing of dramatic works, the rights of the author, his widow, heirs, legatees, and donees, shall be subject to the general rules laid down in the first title of the present law.

" THIRD TITLE.

" *Of the Productions of the Fine Arts.*

"XI. The author of a drawing or picture, who has it engraved, or of a piece of sculpture, who has it cast, shall alone have the right to multiply or authorise the multiplication of the copies.

"This right shall last during the whole life of the author.

"After his decease, his widow, heirs, legatees, or donees, shall enjoy this right conformably to the rules established in the first title of this law.

" FOURTH TITLE.

" *Of Musical Works.*

"XII. The law relative to musical works is made similar in all points, as regards representation, to that of dramatic works,—and, as regards publication by any kind of printing, to that of printed works.

" GENERAL REGULATIONS.

"XIII. In cases where the property, which is the subject of the present law, becomes part of a succession where there is a failure of heirs, the state shall have no claim to it, but the reprinting, publication, or representation shall be free, without prejudice to the right of the creditors.

" TRANSITORY REGULATIONS.

XIV. "Those heirs, whose exclusive right resulting from the former laws, shall not have expired at the time of the promulgation of the present law, shall enjoy all the advantages that it secures.

"XV. In cases where the exclusive right of the heirs, as established by the preceding laws, has been disposed of for the whole term, either by the author, or by the said heirs, the grantee shall have power to take advantage of the extension of the exclusive right resulting from the present law, subject to the condition of paying to the heirs an additional price, which shall be settled amicably, if possible, if not, according to a valuation to be made by persons appointed judicially for that purpose.

"The grantee, who shall wish to take advantage of this power, shall be bound, in case he cannot settle this additional price amicably with the heirs of the author, to make a declaration of his intention to the proper tribunal within the first six months of the last year of the term of his exclusive right.

"The grantee, whose exclusive right shall expire in the year of the promulgation of the present law, shall have six months from the promulgation for making his declaration."

**ART. X.—INTRODUCTION OF TRIAL BY JURY AMONG
THE NATIVES OF CEYLON.**

THE expediency of admitting the natives of India to the benefits of trial by jury has been for some time a subject of much discussion as well in that country as in England. The objections which have been urged against the measure are: that the natives of India, from their division into casts, from their want of intellect, education, and veracity, are incapable of exercising any judicial authority either with credit to themselves, or with advantage to their countrymen. These objections, however, have been completely disproved by an experiment which has been made in the island of Ceylon, under the auspices of Sir Alexander Johnston, while Chief Justice and first member of his Majesty's Council in that island.

The population of Ceylon consists of the four following classes:

First. Of about half a million of people who derive their descent from the Hindoo inhabitants of the opposite peninsula of India, who profess the same modification of the Hindoo religion, speak the same language, and have the same customs, laws, and divisions of casts as those inhabitants.

Secondly. Of about half a million who claim their descent from the people of Ava and Siam, who have the same religions and moral codes, and the same customs, and who profess the same modification of the Buddhoo religion as the inhabitants of those two countries.

Thirdly. Of between 50,000 and 60,000 Mahomedan inhabitants, who are partly of Arab and partly of Mogul descent, who have the same customs and laws, and who profess the same modification of the Mahomedan religion as prevails amongst the different classes of Mahomedans, who inhabit the peninsula of India; and,

Fourthly. Of a very considerable number of the description of people who, in the rest of India are called half-casts, descended partly from Portuguese, partly from Dutch, and partly from English Europeans; some of them professing the Catholic and some the reformed religion, but all of them resembling in character and disposition the half-casts who are found in other parts of India.

As the population of Ceylon was composed of so great a number of each of the four leading divisions of people of which the whole population of India was composed, Sir Alexander Johnston conceived that, should the experiment of extending the rights and privileges of Englishmen, in as far as they relate to the administration of justice, to all the half casts and all the other descrip-

tions of natives on the island of Ceylon, be attended with success, it might thereafter be acted upon with great moral and political advantage in legislating for the half casts and for all the different descriptions of natives on the continent of India.

From the year 1802, the period at which the first royal charter of justice for the island of Ceylon was published on that island, to the year 1811, justice had been administered in the Supreme Court of Ceylon, both in civil and criminal cases by two European judges, according to what is called in Holland the Dutch Roman law, without any jury.

In 1810 it was determined by his Majesty's Ministers in England, on the representation of Sir Alexander Johnston, that the two European judges of the Supreme Court on that island should, for the future, in criminal cases be judges only of the law, and that juries composed of the natives of the island should be judges of the fact in all cases in which any native prisoners were concerned. In November 1811, accordingly, a new royal charter of justice, under the Great Seal of England, was published in Ceylon, by which, amongst other things, it was in substance enacted, that every native of the island, of whatever cast or religious persuasion he might be, when tried for a criminal offence before the Supreme Court, should have the right of being tried by a jury of his own cast, and that the right of sitting upon juries in all such cases should extend, subject to certain qualifications, to every half-cast and to every other description of native upon the island, to whatever cast or religious persuasion he might belong.

The experiment of extending the rights and privileges of Englishmen, as just described, to the natives of Ceylon having been found after 16 years experience to be productive of the greatest security to the government and of the greatest benefit to the people of the country, it naturally became a subject of serious consideration both in India and in England, whether the same rights and the same privileges might not also be exercised with the same good effect by all the natives of the East India Company's dominions in India; and Sir Alexander Johnston, at the request of the President of the Board of Control, wrote, in the year 1825, the following letter, explaining the reasons which originally induced him to propose the introduction of trial by jury amongst the natives of Ceylon, the mode in which his plan was carried into effect, and the consequences with which its adoption had been attended (a). As this letter contains an authentic account of the

(a) It was in consequence of this communication, we believe, that Mr. Wynn introduced into Parliament last session an act extending the right of sitting on juries in the three

presidencies in India to natives of all descriptions. By this statute, 7 Geo. 4, c. 37. It was enacted, that *all good and sufficient persons resident within the limits of the several towns*

commencement, progress, and result of this important measure, by the enlightened judge who introduced it, we cannot do better than give the letter to our readers in the words of the writer.

“ DEAR SIR,

26th May, 1825.

“ I have the pleasure, at your request, to give you an account of the plan I adopted while Chief Justice and first member of his Majesty's Council on Ceylon, for introducing trial by jury into that island, and for extending the right of sitting upon juries to every half-cast native, as well as to every other native of the country, to whatever cast, or religious persuasion he might belong. I shall explain to you the reasons which induced me to propose this plan, the mode in which it was carried into effect, and the consequences with which its adoption has been attended. The complaints against the former system for administering justice on Ceylon were, that it was dilatory, expensive, and unpopular. The defects of that system arose from the little value which the natives of the country attached to a character for veracity; from the total want of interest which they manifested for a system, in the administration of which they themselves had no share; from the difficulty which European judges, who were not only judges of law but also judges of fact, experienced in ascertaining the degree of credit which they ought to give to native testimony; and, finally, from the delays in the proceedings of the Court, which were productive of great inconvenience to the witnesses who attended the sessions, and great expense to the government which defrayed their costs.

“ The obvious way of remedying these evils in the system of administering justice was; First, to give the natives a direct interest in that system, by imparting to them a considerable share in its administration. Secondly, to give them a proper value for a character for veracity, by making such a character the condition upon which they were to look for respect from their countrymen, and that from which they were to hope for promotion in the service of their government. Thirdly, to make the natives themselves, who from their knowledge of their countrymen can decide at once upon the degree of credit which ought to be given to native testimony, judges of fact, and thereby shorten the duration of trials,

of Calcutta, Madras, and Bombay, and not being subjects of any foreign state should be capable of serving as jurors; and power was given to the three Supreme Courts to make such rules with respect to the qualifications, appointment, form of summoning, challenging, and service of

such jurors, and such other regulations relating thereto as they might deem expedient. This act, however, extends only to the limits of the presidencies, and does not affect the administration of justice in the interior of the country.

relieve witnesses from a protracted attendance on the courts, and materially diminish the expense of the government. The introduction of trial by jury into Ceylon, and the extension of the right of sitting upon juries to every native of the island, under certain modifications, seemed to me the most advisable method of attaining these objects.

“ Having consulted the chief priests of the Budhoo religion, in as far as the Cingalese in the southern part of the island, and the Brahmins of Remissuram Madura, and Jafua, in as far as the Hindoos of the northern part of the island were concerned, I submitted my plan for the introduction of Trial by Jury into Ceylon to the Governor and Council of that island. Sir T. Maitland, the then Governor of the island, and the other members of the Council thinking the adoption of my plan an object of great importance to the prosperity of the island, and fearing least objections might be urged against it in England, from the novelty of the measure, no such rights as those which I proposed to grant to the natives of Ceylon ever having been granted to any native of India, sent me officially, as first member of the Council, to England, with full authority to urge in the strongest manner the adoption of the measure, under such modifications as his Majesty's Ministers might, on my representations, deem expedient.

“ After the question had been maturely considered in England, a charter passed the Great Seal, extending the right of sitting upon juries in criminal cases to every native of Ceylon, in the manner in which I had proposed; and on my return to Ceylon with this charter, in November, 1811, its provisions were immediately carried into effect by me.

“ In order to enable you to form some idea of the manner in which the jury trial is introduced amongst the natives and half-casts of Ceylon, I shall explain to you; First, What qualifies a native of Ceylon to be a jurymen. Secondly, How the jurymen are summoned at each Session. Thirdly, How they are chosen at each trial; and Fourthly, How they receive the evidence, and deliver their verdict. Every native of Ceylon, provided he be a freeman, has attained the age of 21, and is a permanent resident in the island, is qualified to sit on juries. The Fiscal, or Sheriff, of the province, as soon as a criminal session is fixed for his province, summonses a considerable number of jurymen of each cast, taking particular care that no jurymen is summoned out of his turn, or so as to interfere with any agricultural or manufacturing pursuits in which he may be occupied, or with any religious ceremony at which his cast may require his attendance. On the first day of the session the names of all the jurymen who are summoned are called over, and the jurymen, as well as all the magistrates, and police officers, attend in court, and hear the charge

delivered by the judge. The prisoners are then arraigned; every prisoner has a right to be tried by thirteen jurymen of his own cast, unless some reason why the prisoner should not be tried by jurymen of his own cast can be urged to the satisfaction of the court, by the Advocate Fiscal, who on Ceylon holds an office very nearly similar to that held in Scotland by the Lord Advocate; or unless the prisoner himself, from believing people of his own cast to be prejudiced against him, should apply to be tried, either by thirteen jurymen of another cast, or by a jury composed of half-casts, or Europeans. As soon as it is decided of what cast the jury is to be composed, the register of the court puts into an urn, which stands in a conspicuous part of the court, a very considerable number of the names of jurymen of that cast, out of which the jury is to be formed; he continues to draw the names out of the urn, the prisoner having a right to object to five peremptorily, and to any number for cause, until he has drawn the names of thirteen jurymen who have not been objected to: these thirteen jurymen are then sworn, according to the form of their respective religions, to decide upon the case according to the evidence, and without partiality. The Advocate Fiscal then opens the case for the prosecution (through an interpreter, if necessary), to the judge, and proceeds to call all the witnesses for the prosecution, whose evidence is taken down (through an interpreter, if necessary), in the hearing of the jury, by the judge; the jury having a right to examine, and the prisoner to cross-examine, any of the above witnesses. When the case for the prosecution is closed, the prisoner states what he has to urge in his defence, and calls his witnesses, the jury having a right to examine, and the prosecutor to cross-examine, them, their evidence being taken down by the judge; the prosecutor is seldom or ever, except in very particular cases, allowed to reply, or call any witnesses in reply. The case for the prosecution and for the prisoner being closed, the judge (through an interpreter, when necessary) recapitulates the evidence to the jury from his notes, adding such observations from himself as may occur to him on the occasion; the jury, after deliberating upon the case, either in the jury box, or, if they wish to retire, in a room close to the court, deliver their verdict through their foreman in open court, that verdict being the opinion of the majority of them; the most scrupulous care being taken that the jury never separate nor communicate with any person whatever, from the moment they are sworn till their verdict, having been delivered as aforesaid, has been publicly recorded by the register. The number of native jurymen of every cast on Ceylon is so great, and a knowledge before-hand what persons are to compose a jury in any particular case is so uncertain, that it is almost impossible for any person, whatever may be his

influence in the country, either to bias, or to corrupt a jury. The number of jurymen that are returned by the Fiscal or Sheriff to serve at each session; the impartial manner in which the names of the jurymen are drawn; the right which the prisoner and prosecutor may exercise of objecting to each jurymen as his name is drawn; the strictness which is observed by the Court in preventing all communication between the jurymen, when they are once sworn, and every other person till they have delivered their verdict, give great weight to their decision.

“The native jurymen being now judges of fact, and the European judges only judges of law, one European judge only is now necessary, where formerly, when they were judges both of law and fact, two, or sometimes three were necessary. The native jurymen, from knowing the different degrees of weight which may safely be given to the testimony of their countrymen, decide upon questions of fact with so much more promptitude than Europeans could do that, since the introduction of Trial by Jury, no trial lasts above a day, and no session above a week or ten days at furthest; whereas, before the introduction of Trial by Jury, a single trial used sometimes to last six weeks or two months, and a single session not unfrequently for three months. All the natives who attend the courts as jurymen obtain so much information during their attendance, relative to the modes of proceeding and the rules of evidence, that, since the establishment of Jury Trial, Government have been enabled to find, amongst the half-casts and native jurymen, some of the most efficient and respectable native magistrates in the country, who, under the control of the Supreme Court, at little or no expense to Government, administer justice in inferior offences to the native inhabitants. The introduction of the trial by native juries, at the same time that it has increased the efficiency and dispatch of the courts, and has relieved both prisoners and witnesses from the hardships which they incurred from the protracted delay of the criminal sessions, has, independent of the savings it enabled the Ceylon Government to make immediately on its introduction, since afforded that Government an opportunity of carrying into effect, in the judicial department of the island, a plan for a permanent saving of 10,000*l.* a year.

“No man, whose character for honesty or veracity is impeached, can be enrolled on the list of jurymen; the circumstance of a man's name being upon the jury roll is a proof of his being a man of unexceptionable character, and is that to which he appeals in case his character be attacked in a court of justice, or in case he solicits his government for promotion in their service. As the rolls of jurymen are revised by the Supreme Court at every session, they operate as a most powerful engine in making the people of

the country more attentive than they used to be in their adherence to truth. The right of sitting upon juries has given the natives of Ceylon a value for character, which they never felt before; and has raised, in a very remarkable manner, the standard of their moral feelings. All the natives of Ceylon who are enrolled as jurymen, conceive themselves to be as much a part, as the European judges themselves are, of the government of their country; and therefore feel, since they have possessed the right of sitting upon juries, an interest which they never felt before in upholding the British government of Ceylon. The beneficial consequence of this feeling is strongly exemplified in the difference between the conduct which the native inhabitants of the British settlements on Ceylon observed in the Kandian war in 1803, and that which they observed in the Kandian war of 1816. In the war between the British and Kandian government in 1803, which was before the introduction of Trial by Jury, the native inhabitants of the British settlements were, for the most part, in a state of rebellion: in the war between the same governments in 1816, which was five years after the introduction of Trial by Jury, the inhabitants of the British settlements, so far from showing the smallest symptom of dissatisfaction, took, during the very heat of the war, the opportunity of my return to England to express their gratitude, through me, to the British government for the valuable right of sitting upon juries, which had been conferred upon them by his present Majesty.

“The charge delivered by my successor, the present Chief Justice of the island, in 1820, contains the strongest additional testimony which could be afforded of the beneficial effects which were experienced by the British government from the introduction of Trial by Jury amongst the natives of the island. (b)

(b) That charge, which is given in the tenth volume of the Asiatic Journal, contains the following passage:

“But there is one feature of the history of offences for the last two years so remarkable, that it cannot, without injustice to the people, be overlooked.

“It has been my duty to examine the criminal calendars of that period, with the view to inform myself of the state of offences generally, and I have been both surprised and gratified to observe that, during this interval, an interval marked by violence and convulsion in the interior, there does not appear to have occurred in our maritime provinces, a

single instance of even a charge of turbulence, sedition, or treason, or of any offence bearing the slightest tinge of a political character.

“It is too well recorded, and is within the personal knowledge of some of yourselves, that, during the Kandian war of 1803, the revolt of some of our maritime districts added, in no slight degree, to the difficulties of that melancholy period.

“To what are we to attribute so remarkable a change? Certainly not to the superior character of the government, in mildness and benevolence: Mr. North's administration was assuredly not exceeded by that of any of his successors. But, Gen-

"As every native jurymen, whatever his cast or religion may be, or in whatever part of the country he may reside, appears before the Supreme Court once at least every two years; and as the judge who presides delivers a charge, at the opening of each session, to all the jurymen who are in attendance on the court, a useful opportunity is afforded to the natives of the country, by the introduction of Trial by Jury, not only of participating themselves, in the administration of justice, but also of hearing any observations which the judges, in delivering their charge, may think proper to make to them, with respect to any subject which is connected, either with the administration of justice, or with the state of society or morals in any part of the country. The difference between the conduct which was observed by all the proprietors of slaves in Ceylon in 1806, which was before the introduction of Trial by Jury, and that which was observed by them in 1816, which was five years after the introduction of Trial by Jury, is a strong proof of the change which may be brought about in public opinion, by the judges availing themselves of the opportunity which their charging the jury on the first day of session affords them of circulating amongst the natives of the country such opinions as may promote the welfare of any particular class of society. As the right of every proprietor of slaves to continue to hold slaves on Ceylon was guaranteed to him by the capitulation, under which the Dutch possessions had been surrendered to the British arms, in 1795, the British government of Ceylon conceived that, however desirable the measure might be, they had not a right to abolish slavery on Ceylon, by any legislative act: a proposition was, however, made on the part of government by me, to the proprietors of slaves in 1806, before Trial by Jury was introduced, urging them to adopt some plan of their own accord, for the gradual abolition of slavery. This proposition, they at that time unanimously rejected. The right of sitting upon juries was granted to the inhabitants of Ceylon in 1811. From that period I availed myself of the opportunities which were afforded to me, when I delivered my charge at the commencement of each session to the jurymen, most of whom were considerable proprietors of slaves, of informing

them, let us ascribe it to the true causes; to the long and steady experience of the blessings of a government administered on British principles; and, above all, to the introduction of the Trial by Jury.

"To this happy system, now (I may venture to say) deeply cherished in the affections of the people, and revered as much as any of their own

oldest and dearest institutions, I do confidently ascribe this pleasing alteration; and it may be boldly asserted, that, while it continues to be administered with firmness and integrity, the British government will hold an interest in the hearts of its Singalese subjects, which the Portuguese and Dutch possessors of this island were never able to establish.

them of what was doing in England upon the subject of the abolition of slavery, and of pointing out to them the difficulties which they themselves must frequently experience in executing with impartiality their duties as jurymen, in all cases in which slaves were concerned; a change of opinion upon the subject of slavery was gradually perceptible amongst them; and in the year 1816, the proprietors of slaves of all casts and religious persuasions on Ceylon, sent me their unanimous resolutions to be publicly recorded in court, declaring free all children born of their slaves after the 12th of August, 1816, which in the course of a very few years must put an end to the state of slavery which had subsisted on Ceylon for more than three centuries.

NOTE.—The following interesting fact connected with the above subject will, we have no doubt, be acceptable to our readers:

A Brahmin of one of the northern provinces of Ceylon was tried some years ago by a jury of Brahmins of the same province, on a charge of having murdered one of his own relations, with a view, after his death, of getting possession of his property. All the witnesses who were examined at the trial gave such decisive evidence of the prisoner's guilt that the jury were about to find the prisoner guilty, when a young Brahmin, who was one of the jurymen, stated to the court, that he entertained considerable doubts of the prisoner's guilt, and therefore requested that all the witnesses might be called back again into court, and that he might be permitted to examine them. Although almost every one of the jurymen, with the exception of the young Brahmin himself, were fully convinced, from the nature of the evidence which had been given, of the guilt of the prisoner, the court acquiesced in the application; and on the witnesses being brought back again into court, the young Brahmin cross-examined them with such talents and skill, that he in a very short time satisfied his brother jurymen and the people who were present, that all the witnesses who had given such decided evidence against the prisoner were engaged in a conspiracy against his life, and that all the evidence which they had previously given with such apparent consistency was utterly unfounded. The prisoner was accordingly acquitted by the jury, without a dissentient voice, and the young Brahmin was publicly applauded for the great acuteness and perseverance with which he had elicited the truth, and confounded the artifices of those who had conspired against the life of the prisoner. Sir Alexander Johnston, who presided in the court on the occasion, was so much struck with the talents which the young Brahmin had displayed throughout the trial, that he sent for him after the trial was over, and asked from him the nature of the education which he had received, and the course of studies which he had pursued. The young

Brahmin in reply informed Sir Alexander, that he attributed any skill which he might have shown in examining the witnesses at the trial, not so much to the nature of the education, which had been the same with that of most of the other Brahmins, as to the study of a work which he had procured while he was travelling through the peninsula of India, and which he frequently perused and studied, because it had strengthened his understanding more than any other work which he had ever read. Upon examining this work, it was discovered to be a short summary of the Dialectics of Aristotle, which had been translated from Arabic into Sanscrit, and been copied upon a few palm leaves in the Devanagierie character.

PARLIAMENTARY PROCEEDINGS.

Much ridicule and obloquy have been cast upon the constituent and legislative assemblies in France, on account of the multitude of laws which they promulgated during the revolution. The *furor* of legislation was indeed upon them; but great allowances are to be made for the intoxicating influence of the moment, and the exuberant energy of newly-acquired powers. It must be recollected also that the French cleared the ground before them; that they swept away the incongruous mass of legal rubbish, the barbarous and conflicting usages, the arbitrary edicts, which had stifled justice and oppressed the nation for ages. But what excuse can be urged for the English legislature, which, under a mature and settled constitution, has in the ordinary course of sober routine, within the short period of twenty-six years, added *three thousand six hundred* acts to a statute book, the bulk of which had long been complained of as a national grievance?

To say that these 3600 acts were called for by the wants of the community, would be an insult to common sense. To say that they originated in an arbitrary design to shackle and control the liberty of the subject, would, as a general proposition, be illiberal and unjust. Some, no doubt, sprung from that source. But a far greater number owe their being to mere legislative wantonness; to that petty, meddling, over-officious spirit, which would regulate by law what ought to be left to the morals, the tastes, the feelings, and the interests of mankind; which would render men pious, and humane, and prudent, and thriving, by act of parliament. Others again have been the result of personal influence; and the nation has on more than one occasion been constrained to bend and accommodate itself to individual convenience, and family arrangements. Lastly, no small portion of this mass of enactments may be traced to the vanity of law-making. "Apprenticeships," says Blackstone, "are held necessary to almost every art, commercial or mechanical; a long course of reading and study must form the divine, the physician, and the practical professor of the laws; but every man of superior fortune thinks himself *born* a legislator." Now these legislators by intuition are the most industrious in enlarging the statute book.

Great is the pleasure, as we are informed by philosophers, to be derived from a consciousness of existence; and that consciousness

is most effectually maintained and evidenced by action. The action of a senator consists in making laws : what therefore more natural than that he should endeavour to preserve, as well in others as in himself, a consciousness of his senatorial existence, by the introduction of an occasional bill ? Other powerful allurements are not wanting. To one who has heard of the Lex Julia and the Lex Cornelia among the ancients, and Lord Erskine's Bill, Lord Ellenborough's Act, and Mr. Peel's Bills among the moderns, how captivating the idea of having *his* name also associated with some law, and sounded familiarly by bar and bench ! How flattering to Mr. Tomkins, that a man should be sent to the treadmill by the salutary provisions of Mr. Tomkins's Act !

The facility, too, with which legislative propositions are admitted, is in itself an irresistible temptation to an aspiring senator. If he will but steer clear of those dangerous and grating alliterations, reform and retrenchment ; if he will make no attempt to disfranchise rotten boroughs, or to interfere with sinecures and vested interests ; if he will leave untouched rents and dividends, and the privileges of chartered companies ; if he will respect prerogative and *established principles*, the world of legislation lies before him, the " rascal many " are at his command. " *In capite orphani discit chirurgus*," says the Latin version of an Arabic adage. In former times the Jews, and then the Papists, were the most convenient subjects for a young English legislator *to try his hand on*. But now the working classes are perhaps the safest ; and on their heads he may solve his political problems. If he has none to solve, he need not on that account be idle ; he may introduce an act *to render more effectual* a statute passed *incerto tempore*, for preventing butchers from buying flesh of Jews and selling the same to Christians ; (a) or an act *to regulate* the mode of catching cockles ; or an act *to improve* the culture of mignonette in pots, and for the better encouragement of window-*parterres*, and other civic vegetation.

The several weighty reasons for making laws, which we have enumerated, will account, in some measure, for the 3600 statutes of six-and-twenty years. But what is far more important than any speculation upon the origin of these statutes is the circumstance that every member of the community "*is bound and presumed to know*" their provisions, according to that reasonable maxim of the law, *Ignorantia juris, quod quisque tenetur scire, neminem excusat*. We think, therefore, that we shall be doing acceptable service to the public by giving abstracts of some, at least, of the 140 or 150 acts annually passed, and thus assisting persons to attain the voluminous knowledge required by law.

(a) This statute is actually in being. Stat. Inc. Temp. 1. c. 7.

Nor shall we confine our notice to those acts which have received the royal assent. The community should not only be informed of the statutes which are in operation, but of those also with which it is menaced. If attention had been paid to the progress of bills through Parliament, the Vagrant Act, 3 Geo. 4, c. 40, could never have passed into a law; nor would many an anxious and sighing couple have been reduced to the painful alternative of either attempting to perform the impossibilities enjoined by the Marriage Act, 3 Geo. 4, c. 75, or of suffering the heart-sickenings of hope deferred. It will be our duty, therefore, whenever we have it in our power, to note such legislative measures as are immediately connected with the plan of the present work, while they are yet in their passage through the Houses of Parliament. Besides the practical utility of this course, it will be no less interesting than instructive to mark the various successive stages in the process of legislation, and to compare a well-proportioned bill, as it passes from the hands of its parents, with the altered, mutilated, and grotesque form which it often presents at the close of its eventful journey. (b)

The bills at present before Parliament, of which we shall furnish abstracts, are entitled to more than an ordinary degree of attention from all classes. Of these the most important are the three bills introduced by Mr. Peel for the amendment of the Criminal Law.

MR. PEEL'S BILLS.

The first bill amends and consolidates the provisions of the various statutes relative to Larceny; to offences of stealing below the degree of Larceny; to Burglary, Robbery, and Threats for the purpose of Robbery or of Extortion; to Embezzlement, False Pretences, and the Receipt of Stolen Property.

These offences are distinguished into Felonies, Misdemeanors, and offences punishable summarily.

In order to avoid repetition, we shall divide the Felonies into classes, according to the amount of punishment proposed to be inflicted.

CLASS 1, of Felonies. Those punishable with death.

CLASS 2. Those punishable with transportation for life, or

(b) The Marriage Act, 3 Geo. 4, c. 75, upon its return to the House of Commons from its pilgrimage to the Upper House, exhibited no sign of its identity, except the preamble. There is a story in Hierocles of a man who, having purchased a house, put his head out of the window, and

asked the passengers 'how the house became him?' If the Marriage Act had been able to speak any other language but that of Lords and Commons, it would, no doubt, have exclaimed, 'How does my preamble become me?'

for any term not less than seven years; or imprisonment for any term not exceeding four years, and, if a male, whipping publicly or privately once, twice, or thrice, if the Court should think fit.

CLASS 3. Those punishable with transportation for any term not exceeding fourteen years, nor less than seven years; or imprisonment for any term not exceeding three years, with whipping as above.

CLASS 4. Those punishable with transportation for seven years, or imprisonment for any term not exceeding two years, with whipping as above.

We now proceed to the provisions of the bill.

SECT. 2. The distinction between grand and petty larceny is abolished.

SECT. 3. Larceny, and felonies, treated by the bill as larceny, to be punished as felonies of the fourth class; upon any subsequent conviction, as of the second class.

SECT. 4. In case of imprisonment, the Court to have power to order hard labour, or solitary confinement.

SECT. 5. Stealing of valuable securities to be deemed larceny.

SECT. 6. Robbery from the person, a felony of the first class; stealing from the person; assaults, with intent to rob, or demands accompanied by menaces or force; punishable as felonies of the second class.

SECT. 7. Obtaining money by threatening to accuse any person of an infamous crime to be deemed robbery.

SECT. 8. Sending letters threatening to accuse, &c. for the purpose of extorting money, a felony of the 2d class.

SECT. 9. What shall be deemed an infamous crime.

SECT. 10. Breaking into a church or chapel and stealing, or stealing and breaking out, a felony of the 1st class.

SECT. 11. Burglary, the same.

SECT. 12. Breaking and entering a dwelling house, and stealing therein; or stealing in a dwelling house, any person being therein, and put in fear; or stealing in a dwelling house to the value of five pounds, the same.

SECT. 13. No building to be deemed part of the dwelling house, unless there shall be a door-way or window common to them, or a covered passage leading from one to the other.

SECT. 14. Breaking and entering a building within the curtilage, but not forming a part of the dwelling house, and stealing therein, a felony of the 2d class.

SECT. 15, 16, 17. Breaking and entering a shop, &c., and stealing; stealing goods in process of manufacture to the value of ten shillings; stealing goods from any vessel on a canal or river, &c., felonies of the 2d class.

SECT. 18. Plundering a ship in distress or wrecked, a felony

of the 1st class ; but stealing goods of small value that have been stranded, without circumstances of cruelty or violence, may be prosecuted as larceny.

SECT. 19, 20. Fine for having in possession shipwrecked goods, &c.

SECT. 21. Stealing, &c. records, or other proceedings of a court of justice, punishable as larceny.

SECT. 22, 23, 24. Stealing or destroying wills, &c. ; stealing writings relating to real estates ; misdemeanors liable to be punished with seven years' transportation ; and this without prejudice to any remedy at law or equity.

SECT. 25. Horse-stealing, cattle-stealing, and sheep-stealing, felonies of the 1st class.

SECT. 26. Killing or stealing deer in inclosed ground, punishable as larceny ; in uninclosed ground, for a first offence punishable by fine summarily, for a subsequent offence, as larceny.

SECT. 27, 28. Fines for having venison in possession, and for setting engines for taking deer.

SECT. 29, 30. Deerkeepers may seize guns ; resistance to keepers punishable as larceny. Apprehension of persons charged with offences relating to deer.

SECT. 31. Killing hares or conies in a warren in the night-time, a misdemeanor ; in the day-time punishable summarily.

SECT. 32, 33, 34. Stealing dogs, or beasts, or birds, kept in confinement, not being the subjects of larceny ; having stolen dogs, &c. ; or their skins in possession ; killing pigeons, &c. ; punishable summarily.

SECT. 35, 36, 37. Taking fish in any water situate in land belonging to a dwelling house, a misdemeanor ; in any private fishery elsewhere, punishable summarily. Nets, &c. may be seized. Anglers excepted. Penalty upon anglers for refusing to give their names, &c.

SECT. 38. Stealing oysters, &c. from oyster-beds, larceny ; unlawfully dredging for oysters, a misdemeanor ; the fine for which is limited to twenty pounds, and the imprisonment to three months.

SECT. 39. Stealing from certain mines, felony, punishable as larceny.

SECT. 40, 41. Stealing trees growing in a park, &c., if the value exceed 1*l.* or growing elsewhere, if the value exceed 5*l.*, felonies punishable as larceny. Stealing trees, wheresoever growing, to the value of a shilling, punishable summarily for the 1st and 2d offences ; and for any subsequent offence, felony, punishable as larceny.

SECT. 42, 43. Stealing quick fence, &c. punishable summarily.

SECT. 44, 45. Stealing fruit or vegetables growing in a garden, &c.; for the first offence, punishable summarily; for any subsequent offence, as larceny; growing elsewhere, punishable summarily.

SECT. 46. Stealing fixtures, &c., punishable as larceny.

SECT. 47. Depredations committed by lodgers and tenants to be deemed larceny.

SECT. 48, 49, 50. Clerks or servants stealing from their masters, or embezzling money, &c. received on their masters' account, to be deemed guilty of a felony of the 3d class.

SECT. 51, 52, 53, 54. Agents embezzling money or securities entrusted to them; factors pledging goods entrusted to them for sale, to be deemed guilty of a misdemeanor, liable to be punished with transportation for fourteen years; this without prejudice to any remedy at law or equity.

SECT. 55. Obtaining goods by false pretences, with intent to cheat or steal, to be deemed larceny.

SECT. 56, 57, 62. In felony, the receivers of stolen property may be tried either as accessaries after the fact, or as substantive felons. In misdemeanor, the receivers may be prosecuted for a misdemeanor, whether the principal be convicted or not, and are liable to be *punished in the same manner as felons of the fourth class*. In offences punishable summarily, receivers to be punished as principals.

SECT. 58. Receivers triable where they receive the property, where it is found in their possession, or wherever the original offence may be tried.

SECT. 59. An owner prosecuting the thief or receiver to conviction, is to have his property restored to him, with exceptions.

SECT. 60, 61. Persons taking reward to help others to the recovery of stolen property, *unless they cause the offender to be brought to trial*, guilty of felony of the second class. Persons advertising a reward, to forfeit 50*l*.

SECT. 63, 64. Aiders and abettors punishable as principals.

SECT. 65, 66, 67. Relate to the apprehension of offenders, the period for commencing summary proceedings, and the application of forfeitures, &c.

SECT. 68. In case of a summary conviction, if the person convicted does not pay the penalty, he may be imprisoned *for any term not exceeding the rate of one day for every two shillings*; such imprisonment never exceeding twelve months.

The remaining nine sections relate to the form of conviction; appeal; venue in actions against persons for any thing done under this act; rules for the interpretation of the act, &c. &c. &c.

The above bill will effect a most substantial improvement in the Criminal Statute Law. Much has been done in the way of simpli-

fication; the language, although it still savours of the old leaven, is intelligible; and words are not used apparently for the purpose of concealing the meaning. It might, however, be contracted into a much smaller compass, without any prejudice to its perspicuity, by the adoption of some such mode of classification as that which we have employed merely for our own convenience in abstracting it. There are one or two other suggestions also which we would offer for consideration. The second clause of the bill abolishes, as we have seen, the distinction between grand and petty larceny. No objection can be started to the principle of this abolition. But unhappily a statute of great importance to the due administration of justice is thereby virtually repealed.

Our readers are aware that by the old law a person convicted of any felony was disqualified as a witness; and it was decided in the case of *Pendock v. Mackender*, 2 Wils. 18, that one who had been convicted of petty larceny was an incompetent witness to a will. In consequence of that decision, the 31 Geo. 3, c. 35, was passed, which declared, that "no person should be an incompetent witness by reason of a conviction for petty larceny." But by the clause in question petty larceny will cease to exist; and consequently the provision of 31 Geo. 3, will be nugatory. As it is impossible to conceive that Mr. Peel could have wished to extend the list of disqualifications in the law of evidence, we must take it for granted that the above statute escaped his notice; and we shall rejoice at the oversight, if it be the means of directing the attention of the legislature to the whole doctrine of disqualification, upon which we have fully expressed our opinion in the foregoing pages.

With regard to the other provisions of the bill, there seems to be no sufficient reason for classing some of the offences as misdemeanors, whilst others of comparatively less moral turpitude are ranked as felonies. The law which pronounces a *clerk or servant* to be a *felon*, who embezzles money received on his master's account (sect. 49), ought surely not to soften down to a *misdemeanor* the act of a *banker, agent, or factor* (sections 51, 53), who embezzles property entrusted to him in the course of business. There is also an anomaly in sect. 57, where a receiver of goods, the taking of which is a misdemeanor, is declared guilty of a *misdemeanor*, but is liable to be punished as a *felon*. The 68th section, apportioning the imprisonment upon non-payment of a penalty to the amount due, is most judicious.

The next bill consolidates the statutes relative to malicious injuries to property. We shall here also adopt the same classification of felonies as in the last abstract, for the reasons there assigned.

SECT. 2. Setting fire to any church or chapel ; to any house, &c. ; to any building used for trade, &c. ; felonies of the 1st class.

SECT. 3. Destroying silk, woollen, linen, or cotton goods in loom, &c. ; or machinery belonging to those manufactures ; or breaking into any building with intent to destroy ; felonies of the 2d class.

SECT. 4. Destroying threshing machines, &c., felony of the 4th class.

SECT. 5, 6, 7. Setting fire to a coal-mine, felony of the 1st class ; drowning a mine ; destroying engines in a mine ; felonies of the 4th class.

SECT. 8. Rioters demolishing any church, house, building, machinery, &c., guilty of felony of the 1st class.

SECT. 9, 10, 11, 12. Firing or destroying a ship, felony of the 1st class ; damaging a ship otherwise than by fire, felony of the 4th class ; causing the loss of a ship in distress, or the loss of life, or destroying the cargo, felony of the 1st class ; mode of trial.

SECT. 13. Destroying any sea-bank, &c., felony of the 2d class ; removing piles, &c., of the 4th class.

SECT. 14, 15. Destroying a bridge, felony of the 2d class ; pulling down turnpike-gates, of the 4th class.

SECT. 16. Breaking down the dam of a fishery, felony of the 4th class.

SECT. 17. Killing or maiming cattle, felony of the 2d class.

SECT. 18. Firing any crop of corn, &c., or stack, &c., or plantation, &c., felony of the 1st class.

SECT. 19. Destroying hopbinds, felony of the 2d class.

SECT. 20, 21, 22, 23, 24. Persons guilty of destroying trees, &c., fruit or vegetables, &c., quick-fences, &c., punishable in the same manner as those convicted of stealing the same, under sections 40, 41, 42, 44, and 45, of the larceny bill.

SECT. 25. Persons damaging property in any case not provided for above, to be fined summarily.

SECT. 26. Malice against the owner not necessary.

SECT. 27. Apprehension of offenders.

SECT. 28. Aiders and abettors punishable as principals.

SECT. 29. In imprisonment for felony, hard labour or solitary confinement may be ordered.

SECT. 30. After a conviction of a clergyable felony, a subsequent offence punishable as a felony of the 2d class.

The remaining thirteen sections are the same *totidem verbis*, as the 64th, the 66th, and eleven following sections of the larceny bill, with one slight exception in the last section.

The above two bills, it will be observed, diminish considerably the number of capital punishments, and in other respects mitigate

the severity of the law; but it is also observable, that they enjoin summary proceedings in a great variety of cases. This originates, we have no doubt, in a humane desire to save petty offenders from the long imprisonment before trial, which is the natural consequence of the *total inefficiency* of grand juries, as a check upon committing magistrates, and as a protection to the innocent accused. There is but the choice of evils; and, therefore, with all our well-grounded jealousy of the summary powers already possessed by magistrates, we are scarcely prepared to resist the proposed measures.

The third bill amends and consolidates the statutes relative to Remedies against the Hundred.

SECT. 2 provides that where damage is done by rioters the hundred shall make full compensation.

SECT. 3, 4. Where certain description of damage is done otherwise than by rioters, the hundred shall be liable to make compensation to the amount of 200*l.* unless one of the offenders shall be convicted within fourteen months after the commission of the offence.

SECT. 5. Process to be served on the high-constable.

SECT. 6. Inhabitants competent witnesses.

SECT. 7. Sheriff, on receipt of the writ of execution, to make his warrant on the county-treasurer to pay the amount.

SECT. 8. Mode of reimbursing the high-constable for his expences, and also the county-treasurer.

SECT. 9, 10. Summary mode of proceeding, where the damage does not exceed 30*l.* The ninth clause remedies a defect which was discovered in 3 Geo. 4, c. 33, by the Court of King's Bench, *Rex v. Just. of Somerset*, 4 B. & C. 913, where the court was obliged to stretch the statute in order to do justice.

SECT. 11. Penalty on high-constable for neglect of duty.

SECT. 12. Proceedings where a church or chapel or the property of a corporation is damaged.

The four remaining sections provide for the cases of counties, of cities, liberties, &c. not within any hundred, or not contributing to the county-rate; and of places where writs are directed to other officers than the sheriff.

Subsidiary to the above three bills, there is a fourth repealing 127 statutes wholly, or in part.

CHANCERY BILL.

THOUGH the Report of the Chancery Commission has been long before the public, and it might, therefore, have been supposed, that an examination of the bill intended to give effect to its

propositions would be a task of no great difficulty, under which supposition it was, at one time, in contemplation to hurry its progress through the House of Commons with most extraordinary speed, we find, upon perusal of the proposed measure, that very considerable explanation and much discussion will be necessary before its real bearings, and the quantum of reform which it may be calculated to work, can be made evident, either to the professional or unprofessional reader. The propositions on which this bill is founded were, in themselves, sufficiently numerous and complicated; and the manner in which the bill has dealt with them, adopting some, splitting others, rejecting many, changing the language of all, and the effect of no inconsiderable number, has greatly augmented the difficulty of analysis. When it was stated, therefore, in the House of Commons, that the bill might, with propriety, be read a second time, and be committed, within a week of its introduction, because the Chancery Report and propositions had been above twelve months before the House, the honourable member who used the argument must either have overlooked the peculiar construction of the bill, or undervalued its importance; he must either have omitted to compare its schedule with the propositions, or, for a moment, have forgotten that, in the construction of an act of parliament, the change of a single word may essentially alter, and not unfrequently reverse, the intent and spirit of its enactment.

Our readers are aware that the Chancery Commissioners submitted 188 propositions for the reform of the practice of the Court of Chancery. The schedule to the bill before us contains only 145, of which number ten are not to be found in the Chancery Report, though they necessarily rise out of it. This reduction is to be accounted for by the total omission of five propositions relating to appeals,—of seven propositions relating to bankruptcy, which have been abandoned,—and of seven propositions relating to the masters of the Court, which have been provided for in the body of the bill; beside these, several proposed measures, as to registrars, examiners, six clerks, and other matters, have been abandoned. In the arrangement of the schedule, the propositions of the Report have been so intermixed that it is difficult to trace them; for instance, the first, second, and third propositions of the Report (which relate to subpoenas) (a) are embodied in the first, second, and fifty-ninth articles of the schedule; there is, probably, some good reason for this method, but we must take time to discover it.

(a) It is provided that each defendant shall have a separate subpoena; this measure will increase the profits of an useless sinecure; Master

Courtenay, who was one of the Commissioners, should have guarded against this additional charge on the public.

The preamble of the bill, among other things, says—"Whereas many of the said proposed regulations require the aid of Parliament for carrying the same into effect," &c. &c. From this we might have inferred that only such regulations would be included in the bill as would require the aid of the legislature, and that the others would be left to the discretion and responsibility of the Lord Chancellor; we find, however, that these classes of rule are indiscriminately mixed, some in the body of the bill, others in the schedule; we shall proceed to give a very short abstract of the former part, the latter may be collected from the Chancery propositions; we take this course the more especially as it is very generally understood that the bill will undergo material alterations in its progress through both Houses, and it is more than probable that another session may elapse before it finally passes into a law.

It is proposed to be enacted that—

The 145 articles of the schedule shall be confirmed by Act of Parliament.

That if they should be found inconvenient, the Court of Chancery may alter any of them, except those that could not have been established without the authority of Parliament.

That the Vice-Chancellor may hear causes, &c. with special delegation from the Lord Chancellor, as is now done by the Master of the Rolls; but the Lord Chancellor is to retain the power of delegation.

That Master of the Rolls and Vice-Chancellor may discharge orders made as of course on motion or petition *without notice*, by the Lord Chancellor, or by each other.

That Masters shall not derive any fee, profit, or emolument from copies.

That suitors shall not be compelled to take copies.

That when suitors require copies they shall be furnished at the rate of fourpence *per folio*.

That the fees in the Masters' office shall be re-settled.

Masters' clerks are not to receive gratuities.

Masters are to receive 3500*l.* a year salary.

Masters are to render accounts of their fees and emoluments.

Compensation is to be made to other officers at the discretion of the Lord Chancellor, Master of Rolls, and Vice-Chancellor.

The cost occasioned by the act is to be paid out of the suitors' fund.

Surplus is to be re-invested.

Securities may be changed.

Money, if wanted for suitors, is to be paid to them.

Judges of the King's Bench, Common Pleas, and Exchequer, may issue commissions for the examination of witnesses abroad.

The Chancellor may cause writs of *habeas corpus* to be made returnable before any other judge.

Jurisdiction of the Court of Chancery, in regard to friendly societies, is repealed.

Lord Keeper or Lords Commissioners are to have the powers given to the Lord Chancellor by this act.

Nothing in the act is to prejudice the power of the Court to make orders.

The act to commence on the 5th of July, 1827. (?)

WRIT OF RIGHT BILL.

MR. SHADWELL has signalled the outset of his parliamentary career by the introduction of a measure, (some years ago attempted by Lord Kenyon,) for abridging the period of limitation to writs of right and other real actions, and for correcting in some degree that monstrous anomaly in our present law, which, under circumstances precisely similar in point of natural equity and justice, in one case keeps alive an adverse claim upwards of half a century, and in another, allows an unmeaning and virtually secret form, (we mean the fine with proclamations,) to supersede a clear right within the short space of six years. We cannot help expressing a wish that Mr. Shadwell had taken a more comprehensive view of the present laws as to the limitation of rights to real property, and by bringing the whole into one statute, had endeavoured more completely to assimilate legal enactments to that policy, which the decisions of our courts of law and equity, conforming themselves to the exigencies and convenience of a commercial society, have not obscurely developed. A mature examination of the practical results of the rule which courts of equity have adopted by analogy to the law as to possessory actions, would, we think, satisfy the legislature, that the period of twenty years might and ought to be enacted as the general period of limitation; and with respect to the savings which have been usual in our statutes upon this subject, and which have an evident tendency to neutralize in practice all the benefit derivable from a fixed limit to adverse rights, it would seem that an additional period of five years might fully satisfy any claims upon the providence of the legislature, which incapacities of any description may seem to possess.

But without entering further into this important subject at present, we content ourselves with stating the substance of the bill which, under the awkward and incomprehensive title of "A Bill for the further Limitation of real Actions, and for the further Amendment of the Law relating thereto," has recently passed the Commons, and awaits the sentence of the Upper House. The leading enactments of the bill are:—

1. To constitute forty years the period of limitation for the issuing of a writ of right, or writ in any other real action now enjoying a longer period, and for the making of any prescriptive title or claim to lands, &c.

2. That persons now entitled to sue, being infants, *femes covert*, in prison, or out of the realm, shall be allowed six years after their respective incapacities shall cease.

3. That in writs of right and other real actions, the party recovering judgment shall have his costs as in other actions.

4. That issues in fact upon writs of right shall be tried by a jury as in ordinary cases, instead of the grand assize; and the demandant shall make out his title, before the tenant shall be called upon for his defence; and

Lastly, That purchasers or others taking conveyances of lands, may prevent their widows from being dowable thereout, by causing a declaration to that effect to be inserted in the conveyance, instead of the present artificial form used for that purpose.

The operation of the first clause is in the first instance referred to the passing of the act, but is afterwards postponed to the 1st July, 1830, so as not to be a surprise upon any one having a right of action under the existing law. The scope and intent of the second section is not very clear; but it has not that prospective character which the newspaper reports of the debates suggested: the term of forty years has been substituted for the term of thirty years proposed by Mr. Shadwell, but even with this doubtful amendment the act, if passed, will operate a beneficial change to a considerable extent. The third and fourth sections are unquestionable improvements, and are more perspicuously framed than some other parts of the bill. The concluding clause is altogether an excrescence with which the title of the bill and its general subject have no natural connection. We should have preferred a separate bill enacting that henceforth dower should not attach except upon lands which should descend to the husband's heir at law, and we are satisfied that the ladies would be decidedly the gainers in the result, by an arrangement which at first sight places their rights upon a more precarious footing; for it is obvious that, under the existing law as well as the proposed new law, the precaution of barring the right of dower is and will be adopted merely in order to facilitate subsequent alienation, and not with any view to benefit the heir taking by descent at the expence of the unjointured widow, which will nevertheless be its frequent consequence. At the same time the right of dower in equitable estates as to which the husband dies intestate might be given to the widow. This clause in Mr. Shadwell's bill appears untechnical and unsatisfactory in other points of view: e. g. it does not enable a testator in devising lands to make a similar declaration against the dower of the devisee's wife.

We cannot close our observations upon this bill without noticing a remark which is reported to have fallen from the author of the measure, upon the second reading of the amendments. Mr. Hume having proposed as an amendment that the bill should extend to the property of the church, Mr. Shadwell is reported to have said, that "he could not consent to the amendment, *because it went to unsettle an old principle of the law*. The principle to which he alluded was *nullum tempus occurrit ecclesie*. Now the bill he wished to pass subverted no old principle whatever." We could almost exclaim with Don Quixote, "*Sesenta mil Satanases te lleven a ti y a tus refranes*." Is it to be tolerated that so obvious an improvement should be counteracted by musty old saws, and the quiet of the community sacrificed to scraps of barbarous Latin? And why not *subvert old principles*, where they are confessedly absurd and mischievous? *nullum tempus occurrit regi* is quite as old a principle as the one advocated by Mr. Shadwell; and yet it was subverted by 9 Geo. 3, c. 16; and upon what plea the church should have the power of disturbing peaceable possession, after the crown has been deprived of that power, we have yet to learn. It might have occurred to Mr. Shadwell that there is another *old principle*, far more rational than either of the preceding; *Interest reipublice ut finis sit litium*.

COPYHOLD DEVISE BILL.

Another Bill is in its progress through Parliament, contemplating an amendment in the law of devises of customary and other estates, not of freehold tenure. It is intituled, "A Bill to extend the Provisions of an Act of the 59th Year of his late Majesty, for removing certain Difficulties in the Disposition of Copyhold Estates by Will." This title, not originally very pertinent, is rendered much less so by the amendments which the bill has received in the Committee of the House of Commons. The bill itself, and the act whose provisions it proposes to extend, are, if we mistake not, apt illustrations of the peddling spirit in which most of our modern improvements of the law of real property have been conceived. The general policy of the law requiring that all beneficial property in land should be alienable by devise, one short comprehensive enactment would have sufficed to obviate the doubts and perplexities to which the Act of the 55th Geo. 3. gave rise, and the necessity for a new statute, with three distinct clauses bearing upon the question; for we have:

First, a clause extending the provisions of the last-mentioned act to customary freeholds and other property, however denominated, for which a surrender to the uses of a will would otherwise be requisite, either in law or *in equity*.

Secondly, a clause, extending the same provisions to copyholds, &c. held of the King, with a mysterious proviso, that nothing therein contained should *invalidate* any will which would be good if the act had not passed.

And, Thirdly, a clause referring to lands of a customary tenure, commonly called customary or tenant-right estates, and only deviseable in equity through the medium of a conveyance to trustees; and enacting, that, where by the custom any person may dispose of such estate by will declaring trusts, every disposition thereof by will *executed as by law required* for freehold estates, shall be as valid as if a conveyance had been previously made, and the devisee is to have the same estate *at law* as he would have had *in equity* in case of a previous conveyance, unless it appear that his estate was intended to be equitable only.

The fourth clause directs the enrolment of the will in the Court Rolls or manorial books, and that the devisee shall pay fines, heriots, &c. as in case of descent.

The fifth and last clause, in order to remove doubts under the former act as to the effect of a testator devising in general terms all his real estates, or all his lands and tenements, goes the length of enacting, that where any person shall die after the passing of the act, having devised in such general terms, such devise is to pass his copyhold and tenant-right estates, and customary freeholds, and *leasehold estates*, as if expressly mentioned.

Now, amongst other questions which this bill suggests, which our limits will not allow us to put, we would ask, why the customary or tenant-right estates mentioned in the third clause are to be sedulously distinguished from the customary freeholds, &c. alluded to in the first? If it be answered, because the former are not deviseable at law through any medium, we would submit that this fact should have suggested a much more simple form of words for making them directly deviseable; because "the custom of the manor" has nothing to do with the present practice of devising merely equitable interests in these estates; and were it possible that any custom could prevent this indirect testamentary power, it is clear that the provisions of the act should the rather extend to such a case. Besides, the clause ought, in consistency, to embrace those *copyhold* estates, passing by surrender and admission, (and there are many in the county of Durham, and other parts of the north), which are not customarily surrendered to the use of the will, but are vested in trustees, in order to enable a devise of the equitable interest, and which on that account have been considered as unaffected by the 55th Geo. 3. It may be further inquired, why the provisions of the statute of frauds are to be applied to one description of customary estates, whilst the

rest are left to pass by a will unattested, and revocations *by parol* are practicable as to all of them? We apprehend that the last clause must undergo some modification: it is indeed expedient that a devise of "lands and tenements" should include leasehold estates for years, but the same expediency does not exist in regard to the term "real estate," the application of which to chattels real will introduce more confusion and mistake than it is calculated to obviate, particularly in regard to wills existing at the time of passing the act.

In legislating upon the important subject of wills, we are surprised that it did not occur to the framers of this bill to propose the removal of that most obvious defect of the law, the want of a power of perspective disposition, which is daily subverting the most deliberate intentions of testators, and is the most fruitful source of domestic discord and vexation. A comprehensive provision, enabling a testator to devise such real estate, and such beneficial interests in real estates, whether vested rights of entry or action, or contingent or executory interests, as he should be entitled to at his death, would at once sweep away a host of entangling questions about implied revocations, and the effect of the tortious acts of tenants in possession. It is well known that the different decisions upon the statute of wills are utterly at variance in their principle, and that the omnipotent intervention of the legislature is alone competent to harmonise this most important and interesting branch of the laws of real property. The present opportunity ought not to be overlooked.

BILLS OF EXCHANGE BILL.

A bill has been introduced by the Attorney General, relative to bills of exchange and promissory notes, the purpose of which is any thing else than what is stated in the title. It is entitled "A Bill for declaring the Law in relation to Bills of Exchange and Promissory Notes, *becoming payable on Good Friday or Christmas-day:*" whereas so far as Good Friday and Christmas-day are concerned, it relates only to bills of exchange, &c. *falling due on the day before* either of those days. The bill in its original shape, after reciting the 39 and 40 Geo. 3, c. 42, and stating that notwithstanding the said act, and the general custom of merchants, doubts had arisen as to notice of dishonor, provided that where bills of exchange, &c. should be payable on the day preceding Good Friday or Christmas-day, notice of dishonor need not be given until the day next after such Good Friday or Christmas-day; and that whenever Christmas-day should fall on a Monday, notice of bills payable on the preceding Saturday need

not be given until Tuesday. Thus although provision was made for the event of Christmas-day falling on a Monday, none was made for the no less probable contingency of its falling on a Saturday. In the committee two clauses were added. The first provided that Good Friday and Christmas-day should for all other purposes, as regards bills of exchange, &c., be treated and considered as the Lord's-day, commonly called Sunday. The second, after stating that doubts have existed as to days appointed by his Majesty's proclamation for solemn fasts or days of thanksgiving, provided that bills of exchange, &c. falling due on a fast-day or day of thanksgiving should be payable on the day preceding, and that where they should fall due on the day preceding, notice of dishonour need not be given until the day after such fast-day.

Upon re-commitment, days of fast or thanksgiving were added to the first of these clauses; and, in the second, provision was made for the fast-day falling on a Monday; but, as in the case of Christmas-day, none, alas! was made for its falling on a Saturday. And in this shape the bill has passed. We had imagined that all doubts with respect to the great festivals of the church had been long removed, especially recollecting that in the case of *Linds v. Unsworth*, 2 Campb. N. P. C. 802, Lord Ellenborough held that a Jew was not bound to give notice on a great Jewish festival. But if doubts existed, the shortest course would have been to pass an act almost in the words of the first clause (A), added by the Committee in its amended shape; that is, "that Christmas-day, Good Friday, and every day of fast or thanksgiving appointed by his Majesty, shall for all purposes, as regards bills of exchange and promissory notes, be treated and considered as Sunday." This would do away with the necessity of entering into those tedious particulars, which, instead of producing certainty, are, from their omissions, the constant source of error and difficulty. The two clauses introduced by the committee ought to have changed places.

SPRING GUN BILL.

The bill to prevent the setting of spring-guns, which last year originated in the House of Lords, and was thrown out in the House of Commons by a majority, we believe, of *one* only, has been again introduced this session in the House of Commons. It has already passed both Houses, and has been sent back by the Lords with some amendments. The bill is intituled—

"A bill to prohibit the setting of Spring-guns, Man-traps, and other Engines calculated to destroy Human Life, or inflict grievous bodily Harm."

By the provisions of the bill in its present form, setting spring-

guns, or other engines, &c., or allowing them to remain set, to be deemed a misdemeanor. The act not to extend to engines set in dwelling-houses for their protection, nor to traps, &c. set for the destruction of vermin; not to affect or authorise any proceedings already commenced; not to extend to Scotland.

The bill in its original shape limited the prohibition to engines set in *woods, wood-grounds, plantations, and underwoods*, but was amended by the Lords in its present more comprehensive form. Especial care has been taken to avoid the expression of any opinion as to the legality or illegality of such engines by the existing law.

MISCELLANEOUS BILLS.

The following bills are also in progress :—

A Bill to repeal an Act of the 6th Year of His present Majesty, for regulating Vessels carrying Passengers to Foreign Parts, so far as relates to the Carriage of Passengers to the British Possessions on the Continent of North America; and to make further Provision respecting the Carriage of Passengers to the said British Possessions.

(The blanks in this bill not having been filled up, we defer the abstract to our next number.)

A Bill to regulate the the Prosecution of Fraudulent Bankrupts in Scotland.

Any trustee or creditor on the sederunt book may, with the concurrence of his majesty's advocate for Scotland, prosecute any person accused of fraudulent bankruptcy before the high court or any circuit court of judiciary according to the forms thereof, and the judges of such courts to have the same powers as the lords of session respecting such crime.

A Bill to extend the Provisions of an Act made in the 57 Geo. 3, for regulating the Costs of certain Distresses.

The provisions of 57 Geo. 3, c. 93, are extended to any distress or levy which shall be made for any land tax, assessed taxes, poor's rates, church rates, sewer rates, or any other rates, taxes, impositions, or assessments whatever, when the sum, or part of a sum, distrained for, does not exceed ———.

(It would be highly expedient to guard against the frauds of brokers, by fixing certain periods, as the first Monday in every month, and the places at which all goods taken under distress should be publicly sold by auction, unless previously redeemed by the owners.)

A Bill to regulate the granting of Licences to Keepers of Inns, Ale-houses, and Victualling-houses in England.

SECT. 1, 2, 3, 4, 5, 6. General licensing meetings to be held annually; time and place to be appointed by two justices for the division, &c. fourteen days before meeting; justices at such meeting may adjourn, but not to any day within five days after original meeting; special petty sessions to be appointed for transferring licences; time and place for holding adjourned general meeting or special sessions, to be appointed by two justices as aforesaid; constables to attend such meetings under penalty of 5*l*.

SECT. 7. No justice who is a brewer, distiller, [*back-maker, cooper,*]* dealer in malt, [*hops,*] ale, beer, or exciseable liquor, [*wine,*] shall act, or be present, or take part in any discussion or adjudication respecting licences or complaints under this act. And no justice shall act on such occasions in any case which shall have relation to any house of which he is the owner, [*mortgagee lessee,*] manager, or agent; or relating to any house, the property of any [*person whatsoever,*] brewer, distiller, [*backmaker, cooper,*] dealer in malt, [*hops,*] ale, beer, or exciseable liquor, [*wine,*] to whom such justice shall be by blood or marriage, the [*husband,*] father, son, brother, uncle, or nephew, or of whom such justice shall be the partner in any trade. Penalty 100*l*.

SECT. 8. Brewers, distillers, &c. as before, disqualified from acting as clerk of the peace. Penalty, 20*l*.; [*second offence, 100l.*]

SECT. 9, 10, 11. Three justices, not disqualified, to be present at every meeting; every question to be decided by the majority; and every licence to be signed by the majority, not less than three. Where number of justices insufficient, the justices of the adjoining division of the same county may be called in.

SECT. 12, 13, 14, 15. Notice of application for a licence to keep a house, not previously kept as an inn, &c., or for renewal, to be affixed to the church-door, and a copy to be served on the rector, &c.; rector, &c. to certify as to the fitness of persons applying for licence, and of houses to be kept.

SECT. 16. Justices may grant licences if the certificates are favourable; if not, they may examine witnesses on oath, and grant or withhold licence at their discretion.

SECT. 17, 18, 19. Persons applying, to produce certificates from their own parish; rectors, &c. to state their opinions impartially; licence to state whether certificates have been produced.

SECT. 20. Licensed officer to enter into recognisance with sureties; himself in 50*l*., and one surety in 50*l*., or two in 25*l*.—No overseer, peace officer, brewer, &c., nor officer of excise, to be surety.

* The words in *Italic* within brackets are suggested alterations.

SECT. 21. Duration of licence one year, from 5th April in Middlesex, and elsewhere from 10th October.

SECT. 22. In case of death, &c., of person licensed, or destruction, &c. of his house, justices at special session may grant licence to executors, &c., or for another house.

SECT. 23. Licences granted at other time or place shall be void.

SECT. 24. The clerk of the peace to keep a register of licences, fee registering and copy, 2s.; neglecting to register, or refusing inspection, penalty 5*l*.

SECT. 25. Fees to be paid for licences, constable, &c. 6*d*.; high constable, 6*d*.; clerk of the justices, 6*s*.; for preparing precepts and notices, 1*s*. 6*d*.; clerk of the peace, 2*s*.; penalty on taking higher fees, for each offence 5*l*.; [*second offence 10*l*., third offence disqualification.*]

SECT. 26, 27, 28. No sheriff's officer, &c. shall be capable of holding licence; licence transferred to such persons to be void. No excise licence to be granted except to persons licensed under this act. Penalty on selling beer, spirits, &c. without licence, 20*l*.

SECT. 29. Persons licensed shall sell beer and cyder by standard measure; penalty, 40*s*. and costs, over and above any other penalty for the same offence.

(Wine is not included, query, whether it should not be enacted, that all wine bottles should be made according to standard?)

SECT. 30. Justices, when they grant licence, to express the hours of the night and morning during which the house is to be open; where no other time expressed, hours between ten in the afternoon, and five in the morning, shall be deemed unseasonable, reception of travellers excepted. Houses may be closed by order of justices after sun-set, in case of tumult, or expected tumult.

SECT. 30. For first offence against the tenor of his recognisance, offender may be fined 5*l*. and costs, or in case of non-payment committed for one month. For second offence, 10*l*. and costs, or committed for three months. For third offence, the justice is to adjourn the case to the next special petty session under this act, when offender may be fined 50*l*. and costs, or be committed for six months; in such case licence may be suspended. The justices, or party accused may refer the case to the Quarter Sessions; when, on verdict of guilty, the recognisances of the party shall be estreated, and it shall be in the discretion of the Court to punish the party by fine, not exceeding 100*l*., or to adjudge the licence forfeited. If licence forfeited, the offender shall be incapable of keeping an inn, &c. for three years from the adjudica-

tion. Quarter Session may adjourn the case. The Court may proceed though the party does not appear.

SECT. 31, 32. Party acquitted of such alleged (third) offence may, on a subsequent charge of another offence, be found guilty, and punished as for a third offence. Convictions for offences under former acts to be reckoned under this act.

SECT. 33. Justices may order proceedings at the sessions to be carried on by their clerk; expences to be charged on the poor rates, [*county rate?*]

SECT. 34, 35. Penalties on justices may be recovered by action of debt. Other fines and penalties shall be sued for and recovered before one [?] justice, who in case of non-payment may commit the party according to the terms of this act, or, when no time is expressed, for any term not exceeding three months, or may issue a distress.

SECT. 36, 37, 38, 39. Penalty on witness refusing to attend, or be examined, 20*l*. Appeal to the Quarter Sessions, the judgment of which shall be final. Justices may bind parties to give evidence, and commit them in case of neglect or refusal. Sessions may adjudge costs to be paid to the justice against whose judgment an appeal has been brought.

SECT. 40, 41, 42, 43. Actions against justices, &c. to be brought within three months—general issue may be pleaded; form of conviction; convictions to be registered; certiorari taken away.

SECT. 44, 45. This act to commence from the first of November next, after its passing. The following statutes, except so much of them as repeal former statutes, to be repealed: 5 and 6 E. 6, c. 25; 1 J. 1, c. 9; 4 J. 1, c. 4, 5; 7 J. 1, c. 10; 21 J. 1, c. 7; 1 C. 1, c. 4; 3 C. 1, c. 3; 9 G. 2, c. 23, s. 14, 15, 20; 24 G. 2, c. 40, s. 24; 26 G. 2, c. 13, s. 12; 26 G. 2, c. 31; 28 G. 2, c. 19, s. 2; 29 G. 2, c. 12, s. 23, 24; 30 G. 2, c. 24, s. 14; 5 G. 3, c. 46, s. 20, 21, 22; 32 G. 3, c. 50; 35 G. 3, c. 111, c. 1—6, 9, &c.; 38 G. 3, c. 54, s. 13; 39 G. 3, c. 86; 48 G. 3, c. 143. s. 7. 10; 4 G. 4, c. 125, s. 1—6; but licences granted under them, or under 3 G. 4, c. 77, which is to remain in force till the first of November, 1827, and recognizances to remain in force. 3 G. 4, c. 77, to remain as aforesaid.

SECT. 46. This act not to affect the privileges of universities, nor the time of licensing in the city of London, nor the sale of beer, &c. in fairs.

SECT. 47. The words person, party, &c. may be construed in the plural; and also the words house, notice, &c. The words county or place, to include any county, riding, &c. The words rector, or officiating minister, to include any rector, vicar, or

curate; the word inn, any inn, alehouse, or victualling house; the word peace officer, any high or petty constable, &c.; the word beer, any ale, beer, cyder, or exciseable liquor; the word penalty, any fine, penalty, or forfeiture of a pecuniary nature, and the words parish officer to include any churchwarden, chapelwarden, or overseer, and the meaning of these words not to be restricted though subsequently referred to in the singular number or masculine gender only.

(Having introduced this clause, it will be well for the framer of this bill, to revise it with a view to striking out unnecessary words.)

A Bill to provide for the Relief of Persons aggrieved by unlawful or excessive Distresses, or by the Refusal of Acquittance for Rent in Ireland.

SECT. 1. Where a distress is made for rent, not exceeding 10*l.*, justices, on complaint that the distress is illegal or excessive, may summon the party complained against to appear at the Petty Sessions to show cause why replevin should not be made.

SECT. 2. Justices at Petty Sessions may grant an order of replevin, returnable at the next Quarter Sessions.

SECT. 3. Justices may recommend the payment of such sum as they think justly due.

SECT. 4, 5. Recognizance to be entered into by the complainant; form of recognizance, and of replevin order.

SECT. 6, 7. Pound-keeper, &c. on being served with a copy of the order, to deliver up the distress, on pain of being fined ten shillings for every twenty-four hours after that he retains it.

SECT. 8. Recognizance and order to be lodged with clerk of the peace three days previous to the Quarter Sessions.

SECT. 9, 10. Assistant barrister may try the validity of such order, and give judgment, and decree for rent and costs.

SECT. 11. Appeal from assistant barrister to judge of assize.

SECT. 12. Appellant to give security.

SECT. 13, 14. No proceedings under this act, in any case where ejectment had been brought previous to complaint. The act not to extend to crown rents, quit rents, &c.

SECT. 15. Persons paying rent may demand a receipt, providing a stamp, where necessary.

SECT. 16. Penalty for refusing a receipt.

A Bill for the better Administration of Justice at the holding of Petty Sessions by Justices of the Peace in Ireland.

SECT. 1, 2. Counties, cities, &c. may be divided by the Court of Quarter Sessions into districts for holding Petty Sessions; the

order for such division, specifying the extent of each district, to be entered in the crown book.

SECT. 3. Grand jury to present an annual sum for a justice room.

SECT. 4. Clerk appointed by the justices may receive the fees in the schedule.

SECT. 5. Printed table of fees to be affixed within every court-house.

SECT. 6. Registry of proceedings to be kept as in the schedule annexed.

SECT. 7. Informations to be transmitted to the clerk of the crown, &c.

SECT. 8. Particular entry to be made where a single justice acts.

SECT. 9. List of informations, &c. before a single justice to be laid before the Quarter Sessions.

SECT. 10. Summons, &c. to be signed by at least two justices.

SECT. 11. Copies of the statutes not to be distributed to the magistrates until the Petty Sessions have been provided.

SECT. 12. Magistrates at Petty Sessions, may determine any case, although the complaint may have been received at the previous Petty Sessions.

PARLIAMENTARY PAPERS.

THE Reports of Committees and returns made on official authority which are every year laid before the Houses of Parliament, contain much valuable information relative to the law and jurisprudence of the country, which at present is nearly inaccessible from the expensive form in which it is given, and the immense mass of other matter with which it is mixed up. The papers annually presented to Parliament amount to nearly fifty folio volumes, and relate to almost every subject connected with the government and administration of this country and its foreign dependencies. They are printed for the use of the members and not for sale, and though the officers of the Houses of Parliament allow other persons to subscribe for the whole collection, it is only by chance or by favour that papers upon any particular subject can be obtained by those who have occasion to consult them. We, therefore, propose to give, in a short and condensed form, the substance of all the papers laid before Parliament which relate to the subject of the present work, and by these means to render the information contained in them more available to public use.

EXPIRED LAWS.

Enumeration of all the Public General Laws which have expired between 2 February, 1826, being the first day of the last Session, and 14 November, 1826, being the first day of the present Session, omitting only such annual and other Acts as have been replaced by other Acts now in force.

Extending to	Subject.	Original Acts.	Last Continuing Acts.	Time of Expiration.
U. K.	CUSTOMS, (<i>Flax Seed, &c.</i>)	6 Geo. 4. c. 111. sch.		5 April, 1826.
G. B.	PILCHARD FISHERIES.	52 Geo. 3. c. 142.	59 Geo. 3. c. 77.	24 June, 1826.
I.	LINEN MANUFACTURES.	6 Geo. 4. c. 122. s. 42.		1 July, 1826.
G. B. & I.	MENAI BRIDGE.	4 Geo. 4. c. 74. s. 60.	6 Geo. 4. c. 100. s. 51.	5 July, 1826.
U. K.	CUSTOMS, (<i>Cole Seed, &c.</i>)	6 Geo. 4. c. 111. sch.		5 July, 1826.
S.	COPARTNERSHIPS.	6 Geo. 4. c. 151. (<i>Sec 7 Geo. 4. c. 67.</i>)		6 July, 1826.
I.	PUBLIC WORKS.	1 Geo. 4. c. 31. s. 14.	6 Geo. 4. c. 101. s. 12.	24 July, 1826.
E. & W.	APOTHECARIES.	6 Geo. 4. c. 133.		1 Aug. 1826.
U. K.	WAREHOUSED CORN.	7 Geo. 4. c. 70.		16 Aug. 1826.
E.	BANK NOTES.	7 Geo. 4. c. 6. s. 1.		10 Oct. 1826.
G. B.	INDemnITY, (<i>Attornies.</i>)	7 Geo. 4. c. 44. s. 1.		10 Oct. 1826.
U. K.	CUSTOMS, (<i>Licenses.</i>)	6 Geo. 4. c. 111. sch.	7 Geo. 4. c. 48. s. 29.	10 Oct. 1826.
I.	TAXES ON FARMERS.	6 Geo. 4. c. 99. s. 2-4		End of Spring Assizes, 1826.

EXPIRING LAWS.

Enumeration of all the Public General Laws which are about to expire, in the course, or at the end of the present Session of Parliament, or after the 14 November, 1826, and on or before the 1 August, 1828.

Acts expiring at the end of the present Session, 7 Geo. 4. sess. 2.

Extending to	Subject.	Original Acts.	Last Continuing Acts.
I.	INSOLVENTS.	1 & 2 Geo. 4. c. 59. 3 Geo. 4. c. 124.	
S.	CREDITORS.	54 Geo. 3. c. 137.	6 Geo. 4. c. 11.
U. K.	WHEAT, <i>Importation of from America.</i>	6 Geo. 4. c. 64.	

ACTS EXPIRING AFTER 14TH NOV. 1826, AND ON OR BEFORE
1ST AUGUST, 1828.

*N. B. " &c." after any date in the following list signifies " to the end of or
some period in, the session next ensuing the date specified."*

Period of Duration.	Extending to	Subject.	Original Acts.	Last Continuing Acts.
1826.				
23 Nov.	U. K.	Aliens.	56 Geo. 3. c. 86. <i>But see 7 Geo. 4. 53.</i>	6 Geo. 4. c. 33.
1827.				
1 Jan.	U. K.	Corn (Importation)	7 Geo. 4. c. 71.	
1 Jan. &c.	E.	Alehouses	3 Geo. 4. c. 77.	7 Geo. 4. c. 65.
5 Jan.	U. K.	{ Customs (Glass) Ashes and Brimstone (Drawbacks)	6 Geo. 4. c. 111. sch.	
9 March, &c.	I.	Unlawful Societies	6 Geo. 4. c. 4.	
	G. B.	Annual Duties; On Personal Estates, &c.	7 Geo. 4. c. 26.	
	U. K.	Mutiny Acts; Army	7 Geo. 4. c. 10.	
25 March	U. K.	Marines	c. 11.	
	U. K.	Innkeepers (Soldiers)	7 Geo. 4. c. 24.	
	G. B.	Militia; & Pay, &c.	7 Geo. 4. c. 27.	
	I.	Allowances	39. 40. Geo. 3. c. 44.	7 Geo. 4. c. 27. & 25.
	U. K.	Indemnity (Offices)	7. Geo. 4. c. 48. & 35.	
21 June	U. K.	{ Australian Agri- cultural Company	5. Geo. 4. c. 86. s. 1. (As to time of grant- ing Charter.)	
1 July	U. K.	Revenue Inquiry	{ 1, 2 Geo. 4. c. 90. 3 Geo. 4. c. 37. }	5 Geo. 4. c. 7.
1 July, &c.	U. K.	New South Wales, &c.	4 Geo. 4. c. 96.	
	U. K.	Annual Duties; Sugar	7 Geo. 4. c. 113. s. 2.	
5 July	U. K.	Customs (Spelter)	6 Geo. 4. c. 111. sch.	
		(Gloves)	7 Geo. 4. c. 48. s. 7.	
	U. K.	{ British Ships (Repairs; Crews)	6 Geo. 4. c. 110. s. 7, 8.	
	I.	Foundlings	6 Geo. 4. c. 102.	
6 July	E.	Salcey Forest	6 Geo. 4. c. 132. s. 19.	
10 October	U. K.	Excise (Glass)	59 Geo. 3. c. 104.	5 Geo. 4. c. 40. s. 1.
1828.				
5 January	U. K.	Customs (Smalts)	6 Geo. 4. c. 111. sch.	
	E.	London Bridge	7 Geo. 4. c. 40. s. 1.	
24 March, &c.	I.	Yeomanry	43 Geo. 3. c. 121.	4 Geo. 4. c. 15.
25 April	I.	Lighting, &c. of Cities	3 Geo. 3. c. 15. s. 11. 22	47 Geo. 3. st. 1. c. 42.
10 June	U. K.	Van Diemen's Land Company	6 Geo. 4. c. 39. (As to time of grant- ing Charter.)	
25 June, &c.	E.	Charities	{ 58 Geo. 3. c. 91. 59 Geo. 3. c. 81. }	5 Geo. 4. c. 58.
27 June	U. K.	Canada Company	6 Geo. 4. c. 75. (As to time of grant- ing Charter.)	
5 July	U. K.	Customs (Flax) (high duties)	6 Geo. 4. c. 111. sch.	
	S.	Distilleries (Illicit Distillation)	5 Geo. 4. c. 52.	7 Geo. 4. c. 23.
15 July	E.	Naval and Military Pensions, &c.	5 Geo. 4. c. 51.	4 Geo. 4. c. 22.
19 July, &c.	I.	Arms	47 Geo. 3. st. 2. c. 34.	4 Geo. 4. c. 14.

DEBTORS IMPRISONED IN ENGLAND AND WALES.

Total number in custody on the 19th April, 1896.		For less than Six Months.	For more than Six Months and less than One Year.	For more than One Year and less than Two Years.	For more than Two Years and less than Three Years.	For more than Three Years and less than Four Years.	Above Four Years.	For sums under 50l.	For sums under 100l.	For sums under 100l.	For 100l. and upwards.
On Mesne Process . . .	1881	1677	109	65	9	11	10	521	619	331	410
On Judgment Recovered	1002	549	119	143	59	41	91	275	154	161	412
For Costs	53	38	3	6	1	3	2	24	3	17	9

Of these debtors, 139 were in custody under judgments of the Insolvent Debtors' Court; and 315 had applied to that Court for relief, and their petitions were in a course of hearing at the time of the returns; but this latter number was not the whole of those who had applied for relief, as the returns are stated to be incomplete in that respect, the gaolers having no official means of obtaining the information.

Observations.—About two-thirds of the persons in custody for sums above £100 were confined in the prisons of the metropolis.

Out of the 53 persons confined for costs in the whole of England and Wales, it appears, from the returns, that 13 were confined in the City Gaol of Bristol, and only one in London. No explanation is given of this disproportion.

DEBTORS IMPRISONED IN SCOTLAND.

Total number in custody on the 19th April, 1896.	For less than Six Months.	For more than Six Months and less than One Year.	For more than One Year and less than Two Years.	For more than Two Years and less than Three Years.	For more than Three Years and less than Four Years.	For more than Four Years.	For sums under 50l.	For sums under 100l.	For sums under 100l.	For 100l. and upwards.
219	172	32	8	6		1	116	51	31	21

The distinction between "Mesne Process," "Judgment Recovered," and "Costs," is stated in the returns to be unknown in Scotland. And it is stated that the Court of Session is the Court for the Relief of Insolvent Debtors in Scotland, and that the Sheriffs, by whom the returns were made, had no access to know whose petitions were in a course of hearing in that Court.

DEBTORS IMPRISONED IN IRELAND.

Total number in custody on the 19th April, 1827.	For less than Six Months.	For more than Six Months and less than One Year.	For more than One Year and less than Two Years.	For more than Two Years and less than Three Years.	For more than Three Years and less than Four Years.	For more than Four Years.	For sums under £50.	For sums under £50.	For sums under £100.	For £100 and upwards.
664	495	49	44	23	14	39	340	119	73	130

Of these debtors, 38 were in custody under judgment of the Insolvent Debtors' Court; and 138 had applied to that Court for relief, and their petitions were in a course of hearing.

The returns from Ireland do not distinguish between persons in custody on meane process, on judgment, and for costs.

INSOLVENT DEBTORS.

An account of the number of persons who have taken the benefit of the Insolvent Debtors' Act between 1st Dec. 1825 and 1st Dec. 1826.

	In London.	In the Country.	In Wales.	Total.
Discharged	2435	1905	51	4391
Remanded	102	184	7	283

BANKRUPTCY.

Dockets struck between 1st Oct. 1825 and 1st Oct. 1826. } 3549, of these 277 not acted on.

Commissions sealed during the same period. } 3272 783 not opened.

Number of Commissions gazetted between the 1st Oct. 1816 and 1st Oct. 1826—(ten years.

In London 6320

In the Country 7096

Total 13416

Amount of Unclaimed Dividends on the 3d April, 1827, certified under the 6 Geo. 4. c. 16. s. 110.

£ 219,978 9 10.

COMMITMENTS FOR CONTEMPT OF COURT.

An account of the number of persons that were confined for contempts of the Courts of Chancery and Exchequer on the 11th July, 1820,—stating how many have died, or have been discharged, and how many now remain in custody. Also a like account of persons committed for similar contempts since the 11th July, 1820.

Total in custody on the 11th July, 1820	32
Discharged since that period	18
Removed by habeas corpus to other prisons ..	1
Died	8
	— 27

Remained in custody on 7th March, 1827 5

Total number of persons committed for contempts from 11th July, 1820 to 5th March, 1827, inclusive	} 123	
Discharged in same period		85
Removed by habeas corpus to other prisons,		14
Died		4
	— 103	

Remain in custody 20

SETTLEMENT APPEALS.

Statement of the number of Appeal Cases against Orders of Removal tried in the different Courts of Quarter Sessions in England, for the years 1824, 1825, and 1826, respectively; abstracted from the returns from the different counties and towns.

Years.	1824	1825	1826
Number of Cases.	1002	773	1208

PROCEEDINGS BEFORE MAGISTRATES.

THE theoretical severity of the Criminal Law of England, contrasted with the practical impunity of some offenders, and the consequent increase of crime, has long been a reproach to our Jurisprudence ; another evil, as to the apportionment of punishment to crime, has arisen, almost of necessity, from the construction of the Courts of Quarter Session, and from the number of offences over which it has been the fashion of late years to give summary jurisdiction to Justices of the Peace. Every parish has its distinct law, or, which amounts to the same thing, every magistrate has his own peculiar views of the enormity of offences: one is the terror of vagrants, another of poachers, another of old apple women who unrighteously sell their fruit on Sundays ; some take the poor-house, some the ale-house, under their special supervision ; but there is no Supreme Court which can practically bring these discordant elements into unity of action. The theory of the law indeed assigns this office in some cases to the King's Bench ; but every day's observation shows the inefficacy of its control, even where it is called upon to act, and can act, and experience points out numerous evils in the administration of justice which even this tribunal of highest authority in criminal matters cannot remedy.

Our attention has been recently drawn to this subject by observing the disparity of punishment inflicted on offenders for the same or similar offences in different counties, and most specially by the utter disregard of the station and circumstances of the party in calculating the amount of fine or duration of imprisonment ; this is, in some cases, the fault of the Statute Law, by which penalties of 5*l.* and 50*l.* are unsparingly inflicted, without any provision as to whether they are to be levied on the Duke of Northumberland, of whose annual income they would form an infinitely small fraction, or on Giles Gubbins, the ploughboy, on whom a fine of 40*s.* may be a sentence of perpetual imprisonment.

The case which first excited these remarks was tried in January last at the Exeter Quarter Sessions, and was as follows :—

“CHARGE OF ASSAULT.—Major Bacon, of the 17th Lancers, appeared to answer an indictment, charging him with having on the 28th of July assaulted Richard Chudleigh.

“Richard Chudleigh was the first witness called. He stated: on the 28th of July, in the evening, I was riding on my cart with two horses ; I had proper leather reins to the fore horse ; Northbrook-bridge is about 20 feet wide, and horses can pass through the water on one side. When I was at the top of the hill, I saw Major Bacon's carriage on one end of the bridge ; there were others on the carriage besides Major Bacon, and some by the side of the carriage, as if doing something. My horses were going slowly on the proper side of the road ; I was in the direction for going through the water, to

the left of the bridge; when I was about three or four land-yards off, one of the soldiers left the carriage, and ran towards me; he asked my name and my master's; he then caught hold of my fore-horse, on the right side of the head; I jumped off, and asked why he did so; he gave me a very heavy blow with his fist upon the cheek, and I was obliged to hold the horse on one side; then I had two soldiers on me, who beat me very much, cut my lip, and made my nose bleed. Major Bacon was on the carriage, and lashed my horses with his whip; the soldiers beat me so I did not hear Major Bacon say any thing. The soldiers then went to the barrack-yard, some on the carriage and others on foot. I went to the barrack-yard to inquire the names of the soldiers, but they turned me out. There was another cart before me, driven by George Wyburn; he is now at home in bed; he had no reins, and his horses were in the water. When I went to the barracks, I saw Major Bacon driving round the yard, and he ordered the men to turn me out.

"The evidence of the prosecutor was corroborated by several witnesses; one of them, John Bass, said he heard Major Bacon call out, "Pug him," or "Thrash him," he would not be certain which, thinks it was pug him, and they did so until the blood began to fly. Two soldiers were upon him. Major Bacon called out, "Take and drag him in the river, and that will silence him." Major Bacon was sitting on the box; saw him frequently strike the horses in the cart with his whip; heard two gentlemen who were passing observe he had no right to take the law into his own hand, as even if he had been without reins, he might be brought before the magistrates, and punished for it.

"Another witness, John Pridham, said he did not see the beginning; when he first came down he saw Major Bacon whipping Chudleigh's horses; when he passed on the other side he saw two soldiers beating Chudleigh; heard a voice from the box say, "Throw him into the water, and that will silence him;" does not know Major Bacon; there was only one person upon the box at that time.

"On his cross-examination he said the horses of Major Bacon were still; there were no men about the horses; does not know how many soldiers, thinks there were two or three and a livery servant; he was not there two minutes before the carriage drove off; *Chudleigh was blood all over.*

"The Chairman read the whole of the evidence most distinctly and carefully to the jury.

"The Jury returned a verdict of guilty, and the bench, which consisted of ten magistrates, having consulted about fifteen minutes, the Chairman addressed Major Bacon. He said, the Court always acted *dispassionately*—*they were no respecters of persons*, and would administer justice whether the prosecutor was in the lowest rank, or upon a level with the defendant. The Court would have been glad to hear that something like an accommodation between the parties had taken place, which might have influenced them in their judgment;—in the present case, whatever fine was imposed, not one farthing would reach the pocket of the prosecutor, but would go to the Crown. It was painful at all times to pass a sentence, and he always felt regret in doing so, *but he could remark, that whatever took place in that Court would not affect his (Major Bacon's) situation in life, as a gentleman or as an officer highly distinguished in his Majesty's service.* It was the opinion of himself and his brother magistrates, that justice would be abundantly satisfied with a reference to all the circumstances of the case, by a fine of 20*l.*, and defendant to stand committed until the same be paid.

"A true bill was this day found by the Grand Jury against Major Bacon, of the 17th Lancers, for an assault upon John Long, of Honiton, on the 25th of December."

Having very fresh in our recollection the sentence passed by the Surrey magistrates on a Mr. Callagan, for laying a switch across the shoulders of Mr Saurin, nephew of the late Attorney General of Ireland, and son of a bishop, who also happened to be himself a clergyman, but so little inclined to take advantage of the character that he tore the *reverend* from his card, and remembering also the severe sentences of fine, and especially of *imprisonment*, which have been inflicted on humble offenders, we were most specially surprised at this sentence on a Major of Lancers, for one of the most aggravated assaults that ever was committed, viewing the relation of the parties, the total absence of provocation, and the situation of the persons (soldiers) *ordered* to aid in the outrage. If the report before us be correct, and its correctness has never been denied, the sentence can only be justified on one supposition. We must believe that 20*l.* is the *maximum* of fine, and that the Devonshire justices never imprison for assaults. The chairman in his sentence refers to *all circumstances*, we find all the circumstances against the defendant. Let us, therefore, examine this even-handed justice, let us suppose that the carman committed the assault on the major, and from their presumed income, 14*s.* a week and 1600*l.* a year (a barouche and four cannot be kept for much less) calculate the fine —. We make it about 10*s.*—if the carman could not pay it, what should be the imprisonment? The time he could make the money out of gaol, that is, somewhat less than five days!! Would that have been the sentence on Chudleigh, if he had beaten Major Bacon till “*he was blood all over?*”

One word more as to the compliment with which the chairman thought fit to mitigate this extraordinary sentence. “He could remark that whatever took place in that Court would not affect his (Major Bacon’s) situation in life as a gentleman, or as an officer highly distinguished in his Majesty’s service.”

A Field-officer, bound to maintain military discipline, had excited his soldiers to commit a gross and unprovoked assault on a poor carter; the man goes to the barrack-yard in order to identify the offenders (we contend that every officer in the regiment was bound to aid this search), Major Bacon *ordered* the men to turn him out; the Devonshire magistrates are of opinion that this was conduct becoming the character of an officer and a gentleman!! We do not think it necessary to contradict them.

Here we intended to have left this case; but while our article was in the press an action by Chudleigh, the carter, against Major Bacon has been tried before Mr. Justice Park.

“The same facts were proved as in the above report; Mr. Justice Park, in his charge to the jury, is stated to have said the plaintiff was unquestionably entitled to a verdict, but he deprecated the course which had been

taken in bringing this action, and considered the justice of the case had already been answered by the proceedings which had been taken in another Court."

The Jury found for the plaintiff damages 39*s.* which does not carry costs.

The next step in regular course is, that this unfortunate carter should be thrown into gaol for the costs which the jury, by their verdict, have disallowed him: he will there have leisure to suspect, that law is a luxury in which the rich and powerful may indulge with impunity; the poor must content themselves with admiring its beauties at a respectful distance. It is possible that he may hear of very different sentences and very different damages in other and similar cases, and he may wonder, as we do, what there could be in his particular instance which should consign himself, instead of the defendant, to a prison. The magistrates and the jury may be aware of some such peculiarity, and they are certainly entitled to all the justification which Mr. Justice Park's concurrence of opinion can give them; but we, who can only reason on what we see reported, and uncontradicted, must, in our ignorance of such peculiarity, remain unsatisfied, both with the judgment of the Quarter Sessions, the direction of the Judge, and the damages awarded by the Jury. It is quite new to us to hear a judge deprecate compensation for a civil injury, because the offender has suffered punishment for a breach of the peace; we have been accustomed to a contrary doctrine (*b*), and have not unfrequently heard a subsequent action or indictment recommended from the bench. We have observed also that there exists no inclination in the judges to discountenance as many actions or indictments as there may be offenders, though the offence be one and the same; in cases of *libel*, that concerning the Idiot Smith for instance, none of the learned guardians of

(*b*) Blackstone says, "And here I must observe, that, for these three last injuries, assault, battery, and mayhem, an indictment may be brought as well as an action; and frequently both are accordingly prosecuted; the one at the suit of the crown for the crime against the public; the other at the suit of the party injured, to make him a reparation in damages." But they manage these things much better in France, where both interests are secured under one proceeding; the party injured being allowed to interpose for damages in the suit of the public

prosecutor. "Toute personne qui se prétendra lésée par un crime ou délit pourra en rendre plainte, et se constituer partie civile devant le juge d'instruction." * * * "Les plaignans pourront se porter partie civile en tout état de cause, jusqu'à la clôture des débats; mais en aucun cas, leur désistement après le jugement ne peut être valable quoiqu'il ait été donné dans le vingt quatre heures de leur déclaration qu'ils se portent partie civile." *Code d'Instruction*, liv. 1, cap. 4. We shall have occasion to revert to this subject.

the law interposed the weight of his judgment in favor of any one of the numerous defendants who were accused of copying (without actual malice) a statement which they believed to be true; but in the case before us, where soldiers have been excited by their superior officer to commit an assault on a poor fellow, whose only offence was, that he had not estimated the restiveness of a gentleman's horse, or the impetuosity of a field officer's temper, to hold his head to the ground by the ears, and beat him till he bled very profusely—"was blood all over;" the justice of this case is satisfied by a fine of twenty pounds on the offender, not the amount of a fortnight's pay and allowances received by the gallant Major for protecting the lives and liberties of his Majesty's liege subjects!! And the accessories escape unpunished. Chudleigh had a right of action against each of them—each of them ought to have been indicted; (c) but when the poor fellow sought to identify the men who had so grievously injured him, he was turned out of the barrack-yard: this may be good military discipline, but it is a very bad specimen of civil liberty. Mr. Justice Park may be right in saying that there ought to be an end to these proceedings; but we strongly suspect that a very high tribunal, Public Opinion, will come to a different conclusion.

In the mean time, John Long, of Honiton, will do well to be careful in his proceedings; he had better ask Richard Chudleigh what his have cost him, and whether, in the end, he will not be more severely punished for having been assaulted, than if, in any ordinary case, he had been the assailant.

Hitherto we have only considered, and that cursorily, the disproportion of punishment as compared with the rank and circumstances of offenders; we shall now lay before our readers two or three cases which have occurred within the last quarter, in which penalties have been inflicted utterly disproportioned to the offence committed, and with utter disregard to the age or sex of the offenders.

"Last summer, Mary Marshall, a young woman of good character, was weeding in a field, with some other women, when they found a nest, containing some eggs. As they did not suppose that there was any crime in taking the eggs of a wild bird, they agreed to divide them, and as she happened to have a basket with her, they were put into it, and carried

(c) They were indicted; but, as it appears, not punished. The magistrates probably thought that obedience to *unlawful* orders was a sufficient justification to the soldiers: if so, what extra punishment did they inflict on the offender who issued those orders? A soldier's situa-

tion is a hard one; he may be flogged or shot for disobedience of an order, for obeying which he might have been hanged. The only counterpoise to the exigence of military discipline is to visit commanders, issuing unlawful orders, with the last severity of civil punishment.

home when their labour was over. The circumstance coming to the knowledge of a gamekeeper, he laid an information against her, and the poor girl, finding that she had committed an offence against the Game Laws, and fearful of the consequences, left her home, and went to Nottingham, where she was taken into the service of Mr. Swandwick, of the King's Head Tavern. Here her conduct was quite in accordance with her previous good character, and in this situation she might have remained, with credit to herself, and to the entire satisfaction of her employer. But justice, it seems, was not satisfied; no expiation had been made for the horrible crime of taking two or three eggs found in a field; and the place of her retreat being discovered, she was dragged away from her comfortable situation, and being taken before the Rev. Mr. Lowe, of Bingham, and the Rev. Mr. Beaumont, of East Bridgeford, this respectable young woman was by them committed for three months to the Southwell House of Correction!"

The poor girl has since been liberated on the following extraordinary memorandum, but not before she had endured a protracted imprisonment.

"County of Nottingham to Wit.

"Take notice, that you Thomas Marshall, of Cotgrave, in the county of Nottingham, labourer, and Matthew Southwell, of Red Lion-street, in the town of Nottingham, horse-dealer, are bound in the several sums of twenty pounds each, as sureties for Mary Marshall, late of Cotgrave aforesaid, single-woman (who is also to be bound in the sum of twenty pounds), upon the condition that the said Mary Marshall shall not, at any time hereafter, take from, or destroy any partridge eggs, in any nest, nor shoot at, kill, or destroy any game whatsoever; and unless she, the said Mary Marshall, fulfil the recognizances entered into by you, the same will be forthwith levied on you both.

"Dated this twenty-eighth day of February, one thousand eight hundred and twenty-seven.

"HENRY COAPE, } Justices of the Peace."
"ROBT. HOLDEN. }

We give this and similar cases in the words of the original reporters.

The next case to which we would direct attention has been brought before the public in a more solemn form, having been made the subject of a criminal information before the Court of King's Bench.

**"THE KING v. A MAGISTRATE OF THE COUNTY OF STAFFORD
AND ANOTHER.**

"Mr. Campbell moved for a Rule, calling upon the defendants, a Magistrate of the county of Stafford, and a farmer in that county, to show cause why a criminal information should not be filed against them for having illegally, corruptly, and oppressively conducted themselves, the one by causing to be committed, and the other by committing to prison two children, a brother and sister, of the age of ten and seven years. The learned Counsel, in support of his motion, read the affidavits of the boy, his father and mother (the little girl being considered too young to join in an affidavit), stating, that on the 12th of October last, the father and the mother having occasion to be absent from their cottage, in conse-

quence of the sickness of a child, the aunt of the children sent them their dinner. After dinner, the children went to an adjoining common, where there was a pool of water, in which was a number of ducks, some of which belonged to the father of the children. The children, having taken off their shoes and stockings, waded through the pool, and the girl, having caught one of her father's ducks, and the boy having caught two ducks belonging to some other person, they returned to the bank, where they sat playing with the ducks. The farmer, having seen the children on the bank with the ducks, desired a man, named Ward, to go and bring the children to him; when the children saw Ward coming towards them, they ran home, leaving their shoes and stockings on the bank. Ward, induced by the farmer's promise of a dinner and some beer, followed the children to the cottage, and insisted that they should come before the farmer. The mother, who had by this time returned home, told Ward, that if the children had done any thing wrong, they should be punished; but finding that Ward was resolved to obey the farmer's orders, she accompanied them to the farmer's house, where they saw the farmer, who said, 'They have been running after my ducks, and they must go before a Magistrate.' The mother, the children, Ward, and the farmer, went to the house of the defendant, whom they found standing before his door, and who, having heard the farmer's complaint, and without having heard what the children had to say, ordered the farmer to take the boy home with him until the next day. The farmer took the boy home, and put him to sleep that night with his cow-man. The farmer, having a rope in one hand, and a candle in the other, entered, in the middle of the night, the room in which the boy slept, and threatened to hang him if he did not confess that his father had ordered him to steal the farmer's ducks. The boy declined to make any such confession, and the farmer, in order to intimidate the boy, put the rope round his neck; but finding that the boy would not confess, he took off the rope, and left the room. On the next day, the children, their mother, Ward, and the farmer, attended at the Magistrate's house, and the farmer having first gone into the Magistrate's private room, the other parties were called in, and the children, upon being asked separately, what they were doing with the ducks, replied, "fighting them." The Magistrate then said, he should send the children to prison. The children begged not to be sent to prison, but to no effect, and the mother having joined in her children's request not to be sent to prison, the Magistrate said, "if you speak another word, I shall send you to prison:" and turning to the farmer, added, "I wish to God you had let the children take the ducks. I wish to God I could send the father, mother, and children all to to gaol." The children were, on the 13th of December, committed to prison, where they remained until the 23d of December, when they were acquitted at the Quarter Sessions. The motives of personal hostility imputed to the defendants in the affidavits were, that the farmer had a short time previously killed a goose belonging to the father of the children, and caused it to be thrown before his door by another person, and that the sister-in-law of the farmer had given evidence in a cause in which the Magistrate had been concerned.

"Rule granted."

The Court of King's Bench will have to adjudicate upon the conduct of these parties; we have at present only to comment on the fact, that two children have been consigned to the contamination of a gaol, on the imputation of an offence, which, if committed, might have been amply punished by domestic castigation—

two children, one of ten, and one of seven, years of age!! "the little girl being considered too young to join in an affidavit!" and yet old enough to be held legally responsible for a crime, the moral turpitude of which she could as little understand as the sanctity of an oath. If she knew that she ought not to steal, she knew also that she ought to speak the truth; if she were held amenable to justice for offending against the one principle, she was entitled to the benefit of the other.

The third case to which we would attract attention is somewhat similar to the preceding. It arose in Ireland, where magisterial malversation is more frequent than in England, because political prejudices, party animosities, and religious feuds, are there permitted to intermix themselves almost universally in the administration of justice. We did, however, hope that, in cases where these disturbing influences could not apply, amends would be made by a milder and more equal administration of the law; the following is a bad specimen:

"William Lawlor and his sisters, Anne and Catherine Lawlor (all of whom are absolute children) were found in Lord Ashbrook's demesne, about ten or twelve days ago, gathering leaves to make a bed of them for a pig. They were taken into custody by the wood-ranger, and brought before Mr. Robert Neville, of Marymount. The magistrate received the examinations of the prosecutor, and convicted the children in the penalty of nine shillings, and, in default of payment, to be imprisoned for one month. Unable to pay the the sum, the children were sent prisoners from the town of Darrow, where their parents reside, to the county gaol, in which they are now confined."

We did not approve of the course adopted by a celebrated Irish Peer in a case of wood-stealing, and yet we must confess that even his mode of chastisement was better fitted to the offence of a child stealing wood than a commitment to the county gaol.

NOTE.

The Abstracts of Bills and Parliamentary Papers necessarily occupy so much space, during the sitting of Parliament, that we have been obliged to defer our observations upon the Proceedings before the Superior Courts of Justice. The same reason has also compelled us to postpone to a future Number the notice of Foreign Publications.



THE JURIST.

JUNE, 1827.

ART. I.—MILITARY LAW.

1. *An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters.*
2. *Rules and Articles for the better Government of all His Majesty's Forces, from the 24th Day of March, 1821.*
3. *General Regulations and Orders for the Army—1822.*

SOME of our unmilitary readers may not be aware, and many of our political readers must have forgotten, or affected to forget, that a bill, commonly called the Mutiny Bill, is annually brought into Parliament, and that the existence and government of the army depends upon the continuance and provisions of that act. If this circumstance had not been overlooked, Sir John Becket, the late Judge Advocate General, would not have been permitted to state uncontradicted, that flogging soldiers was part of the prerogative of the Crown; nor should we have heard this vague term so repeatedly reiterated in debate, whenever attempts have been made to remedy or remove the numerous abuses which impede or pervert the course of military justice.

It may be, and we have no doubt that it is, perfectly true, that the command of the army is part of the royal prerogative, and that, at one time, such command was uncontrolled by any superior power. In the time of Henry the Seventh, when the standing army of England consisted of one hundred beefeaters (*beaufeteers*), the absolute disposal of this imposing force might be safely left to the unfettered will of the sovereign *who paid them*; but when the change of time and circumstances compelled the Kings of England to apply to their Parliaments for the special maintenance of their increasing military establishment, the basis was changed: those who were called upon to pay the army, were entitled to prescribe

the terms upon which they would grant the necessary supplies; those who authorized the establishment of a permanent military force were bound to take every possible precaution by which the danger of such an establishment to the civil liberties of the country could be diminished or prevented; hence the annual enactment of the Mutiny Act and its various provisions, by which the military power of the Crown is now defined and restricted.

One great evil has, however, arisen from the frequent passing of this bill,—it has come to be considered as a mere matter of course, on which a debate seldom takes place, and is yet less frequently attended to. In times of peace and tranquillity the attention of the Commons is not excited to its consideration; and in times of war or tumult, discussion is deprecated and overborne as dangerous or disaffected. Thus circumstanced, the bill has passed, from year to year, without any material alteration; and we are at this moment as far from having a distinct and intelligible military code, as we were in 1689, when the first regular Mutiny Act was passed, for the unconstitutional, but perhaps necessary, purpose of enabling William the Third to retain his Dutch soldiers in England by sending British troops to take their places in Holland.

The very few amendments which have ever been proposed have been encountered by the pretence that they would be invasions of the King's prerogative,—ministerial majorities contending that the absolute government of the army ought to be in the Crown, and, *uno flatu*, enacting a clause (§ 35) by which the power of making Articles of War is given to the Sovereign. Now, if the power had been inherent in the prerogative of the Crown, the clause is superfluous; and the royal assent should never have been attached to a bill, which affected to give to the King that which he actually possessed. If the clause be necessary, we must then conclude that the military government of the army is, at this time, whatever it may have been in time long since passed, actually held by the King by the authority of Parliament, and not in virtue of his royal prerogative.

Having disposed of this point, in order that we may not be stopped *in limine*, by the specious objections of those to whom a mystic word will always stand in lieu of argument, we may the better proceed to point out the several defects with which our military system appears to us to be chargeable: and let it be remembered, that as we do this without the slightest wish to circumscribe the just rights and privileges of the Crown; neither do we intend to convey, by any observations which it may be necessary to make on the effect of military patronage on political influence, any imputation on those who now direct his Majesty's councils: we rather choose this time for comments, because we believe that those who do not stand in need of a corrupt influence, and, what is yet more

important, would not employ it if they did, will be most likely to part with it. His late Majesty made the judges independent, not of himself, for that they were before, but of his successor. So his present Majesty's government may emancipate the army from political influence; not as parting with a power which they would disdain to use, but as binding possible successors who might be less scrupulous. They would thus break in upon that too common error in politics and legislature, of framing, amending, or perpetuating laws, not in respect of any fixed principle, but out of respect to the persons to whom their execution is to be confided. We anticipate for ourselves a perpetuity of upright judges, uncorrupt ministers, and constitutional sovereigns, without looking back to our history of venal chancellors, courtier justices, servile secretaries, and tyrannic despots: we forget the good old maxim of our grandmothers, "What has been may be," and legislate as if a political millennium was surely and gradually approaching, complimenting away our future safety in regard of our present security.

The danger of an excessive standing army in time of peace has ceased to be a theme even for a debating club; and, in a few years, schoolboys will scarcely be taught, and senators will have forgotten, that it was a subject of discussion. We can do no more than draw attention to one branch of the subject: the existence of a permanent military force, and its possible danger to our civil and financial establishments, is not within the scope of our discussion; but military law, as far as it can be said that such law exists, is within the purpose of our work; nor do we transgress its limits, when we contend, that the danger of a standing army can best be averted by giving to that army the greatest possible interest, compatible with military discipline, in the maintenance of the law, by teaching respect to its institutions (a), and by impressing on the

(a) We are very ready to admit that respect for the civil authorities is theoretically inculcated by the articles of war; we are only surprised that the most gross violations of sec. XI. (as in the too celebrated case at the Knightsbridge Barracks, and in the recent instance at Exeter, to which we drew attention in our first Number), have been suffered to pass without reprimand from the military authorities. For the benefit of mayors, bailiffs, headboroughs, and constables, who may have barracks within their districts, and may not be possessed of the articles of war,

we transcribe the section, that these civil officers may, on occasion, be enabled to draw the attention of military commanders to that which, though bound to read every two months, they too frequently appear to forget.

Sec. XI. Art. 1.—"Whenever any officer, non-commissioned officer, or soldier, shall be accused of a capital crime, or of having used violence, or committed any offence against the persons or property of our subjects, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment;

mind of the soldier the conviction that he and the citizen hold their rights and privileges by the same tenure.

We have, therefore, chosen a period of the profoundest peace, foreign and domestic, the administration of a ministry, supported by popular favour on the faith of its liberal principles; and that, also, which is not unimportant, a time when, *vacante sede*, our observations cannot be deemed personal to any illustrious commander, who might interpret precaution against future malversation into personal distrust of existing authorities.

Like too many of the departments of our government, the administration of the army is divided into many offices, the distinct functions of which are not always well defined or well preserved: thus there is nominally a lego-military department for the administration of justice, at the head of which the Judge Martial, or, as he is more commonly called, the Judge Advocate General, presides; yet it is quite evident that this minister is not, in point of fact, the responsible adviser of the Crown in one-tenth of the lego-military matters which are supposed to be submitted to his Majesty's consideration. The Court Circular indeed informs us, from time to time, that the Judge Advocate General had an audience and submitted the proceedings of several courts martial; but those who are acquainted with military affairs and note the result of these conferences are well aware, that the ultimate advice emanates from a different power. On the more important point, however, of dismissal or removal without trial, it does not appear that the legal functionary is at all consulted. We never yet heard of an officer's presenting his memorial through the Judge Advocate General, or stating his case to him in the hope of redress, which naturally would be the case if his office were deemed the proper

troop, company, or detachment, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or on behalf of the party or parties injured, to use his and their utmost endeavours to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order that he or they may be brought to trial. If any commanding officer or officers shall wilfully neglect, or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil

magistrates, or to be aiding and assisting to the officers of justice in apprehending such person or persons, the officer or officers so offending shall, upon being convicted thereof before a general court martial, be cashiered."

The next article refers to protecting soldiers from arrest for debt; but it is singular, that neither that nor the preceding article touches the offence of obstructing the arrest of an officer at the suit of a creditor.—The case of General Gansell (see Junius, Letter xxx.) might have suggested the expediency of some provision on this head.

channel. Even on questions of pure military law, such as that which has occupied much public attention for the last three years, the Judge Advocate General seldom, if ever, takes the lead. In Colonel Bradley's case it was always Lord Palmerston, not Mr. Becket, who took the principal part in debate; and in the case of *Bradley v. Arthur* it was the secretary to the Commander in Chief, not the Judge Advocate General, who was examined by the Court of King's Bench as to the state and practice of military law.

The truth is that the office of Judge Advocate has been hitherto held as a mere political appointment:—to secure a good debater in the Commons, to conciliate a noble family, or to provide for an aspirant, till higher place was open for him, has hitherto been considered as the rule of selection; the candidate indeed has generally been an honorable barrister; but the quantum of his legal acquirement has seldom been taken into calculation,—still less has the minister usually enquired, before he entrusted the interest of some hundred thousand men to the discretion of the favoured member, whether he himself, or any other private person of sound discretion, has ever confided his individual rights to the legal judgment or advocacy of the learned gentleman, in the conduct of any cause, in any Court throughout his Majesty's dominions. We doubt, indeed, whether we should not greatly exceed the average if we assigned one leading brief to each of the Judges Advocate General of the last twenty years; the present learned and very talented officer alone excepted. It is yet more doubtful to us, whether any one of these functionaries ever witnessed the proceedings of a Court Martial, before he himself was called upon to conduct them. The practical working of the system is therefore unknown to them, and they are left to pick up a precarious intelligence from the very imperfect records which are transmitted to them under the name of "Proceedings of a Court Martial." In stating that these records are imperfect, we would by no means be understood to impute any wilful garbling to the officers who are entrusted with their formation; we have, it is true, witnessed some instances, and heard of more, in which the Court has refused to insert matter which it has deemed irrelevant; and this most especially in suppressing the objections taken to points of evidence, and in omitting to state the questions objected to and overruled, or to point the attention of the superior authority, by whom the proceedings and sentence are ultimately to be confirmed, to those which have been questioned and allowed. This is a practice which should be amended by instructing every officer, acting as a Deputy Judge Advocate, to insert in his report every point which has occupied the attention of his Court. As Courts Martial are now constituted this would scarcely add a page to any proceedings. Very few officers, and yet fewer soldiers, under trial have the re-

quisite knowledge to enable them to take objections ; a yet smaller number have the courage to exercise the faculty, if they possess it ; and those who have the necessary moral qualification will do well to pause before they employ it ; a tribunal of doubtful competence to determine the knotty points of the law of evidence, will not consider itself greatly obliged to the prisoner who submits such tough and unpalatable matter to its legal digestion. If a prisoner has seen much of the administration of military justice, he will know, that his objection will probably be quashed at once by the bold and authoritative *dictum* of the President, uncontradicted by the quiescent Deputy Judge Advocate : " Sir, we are a Court of Honor, not a Court of Law ;" and more *sotto voce*, perhaps. " Let us have none of your quibbles, sir ; they'll do you no good, I can assure you." If his objection be discussed and determined, though in his favor, he will scarcely fare the better in the end ; the mere possession of the power of argument in any captain or subaltern, *a fortiori* in any serjeant or soldier, is deemed as dangerous to military discipline as a lamp in a powder magazine. A phrenological colonel would never tolerate the existence of an officer who possessed the organ of philo-moot-a-pointativeness in any considerable degree of development.

The independence of the law of evidence which Courts Martial assume cannot, however, be wondered at ; they cannot unravel its mysteries, and deem it safest to cut them altogether ; but the necessity would not have existed, if the office of Judge Advocate General had not been so long considered as a proximate political sinecure ; if men fully qualified for the execution of its important duties had been selected, they would not have found it difficult to have compiled a collection of the simpler rules most applicable to the business of military courts, which, though they might not have afforded ample instruction to every member, would have enabled their deputies to avoid the commission of egregious blunders ; this has not yet been done. Another desirable measure is, that the officers acting as deputies should be encouraged to correspond on points of doubt and difficulty with the Judge Advocate General, and that their queries (often trivial, as those of scholars must be) should be received with more attention and answered with more regularity and courtesy than has hitherto been practised. The learned and right honorable head of the department might himself find this an improving occupation, and the service would most assuredly be benefited if the more important queries and their answers were circulated, from time to time, in the form of instructions to its junior branches.

Another and very important improvement would be the probable result of more frequent correspondence in this department :—the diligence of the inferior officers would be excited, and their com-

parative abilities made known to those whose duty it ought to be to further their promotion in due regard to their qualifications. The appointment of Regimental Judge Advocate, the first step in the scale, might then be made an object of competition among the junior officers of a battalion; and it must be obvious that each competitor, though he might not attain the rank or requisite qualification of a legal assessor, would, by the attempt alone, be greatly improved as a member of Courts Martial. We are not aware of any good reason (except, *valeat quantum*, misplaced economy) why a Regimental Judge Advocate should not attend all Regimental, Garrison or Detachment Courts, and we are decidedly of opinion that it should be made part of his functions to attend as counsel for every prisoner of his own battalion, who is tried out of the regiment, whether by a General Garrison or Detachment Court: the improvement which such practice would give to his mind is an inferior consideration,—the confidence it would give to prisoners, that impartial justice was done to them, is infinitely more important. A questionable sentence, against which the men (who are better reasoners than is generally supposed) can cavil, or a harsh sentence, which their general knowledge of a culprit's character assures them to be unmerited, does more real harm to discipline, than could by any possibility arise from any fancied security which the guilty might suppose themselves to derive from the assistance of an *ex-officio* defender. Those who will not allow counsel to prisoners in cases of felony need not be alarmed at this proposition; their main argument, the consumption of time, will not apply where the official advocate has no direct interest in display; the other fiction, that the judge is counsel for the prisoner, cannot be urged where the judge is incapable of giving counsel.

Supposing the study of military law, now almost universally neglected, to be enlarged by a more regular appointment of Regimental Judge Advocates, with extended functions, the next step would be to stimulate the exertions of these officers by holding out to their competition the intermediate places of Deputy Judge Advocate General in garrisons, colonies, and marching armies. Amid the profusion of military expenditure, it appears to us to have been a misplaced economy to reduce, as considerably as has been done, the number of permanent lego-military officers on the staff, and to depend on the casual selection of an acting deputy, *pro re nata*, instead of having one fixed and competent individual for the discharge of the duties. It is true that constant employment for such an officer in attendance on Courts Martial may not have been anticipated in many stations, and would not be desirable on any; but there are many other duties, now neglected or inadequately performed, which might safely and beneficially have

been confided to a Judge Advocate, supposing him always to have been selected on the score of ability, and not for the other and very different motives which, in the British service, so frequently and prejudicially influence the staff appointments of the army. A competent legal assessor would have saved many governors of colonies from the commission of acts of injustice; judicious advice on points of doubt and difficulty, arbitration of disputed rights, explanation of obscure regulations, would have saved to the service many worthy and valuable officers, who have been ruined by acting on their own unguided judgments. Colonels of regiments especially might be relieved from the duty of deciding those petty points of dispute which now occupy too much of their time; and which they seldom determine to the satisfaction of the parties, because the litigants feel that they are submitting to the power of a commander, not to the discretion of a judge. The judicial and executive functions, it is admitted, in all other cases, should be kept distinct; and we do not believe that military discipline requires their separation; very many instances might be cited in which palpable injustice is done by uniting them in the same person. The commanding officer of a regiment, for instance, orders a new tuft, half-a-dozen yards of extra lace, or some other military foppery, unauthorised by his Majesty's regulations, to be added to the dress of the soldier, and that this shall be paid for by stoppages out of his pay. The soldier demurs—refuses to sign his accounts—is tried by a regimental Court Martial, possibly consisting of five *minors* (b), and is sentenced

(b) This obvious defect ought long since to have been amended, the only excuse that can be urged in its favor is, that on some stations it may be difficult to procure a sufficient number of officers to constitute a Court Martial, if minors were excluded: the remedy is easy, it may be provided that no officer under the age of twenty-one years shall sit on any Court Martial, except in cases when it shall be certified that a sufficient number cannot be otherwise obtained. It would be better to allow Surgeons, Paymasters, Quarter Masters, and other staff officers now exempted, to sit on urgent occasions, than to continue the anomaly of allowing a minor, who in respect of presumed immaturity of judgment is not allowed to bind himself in civil contract to the extent of a single shilling, to sit in judgment on the life of a

soldier. It is of the utmost importance that the men should feel confidence in the tribunal to which their persons and lives are subjected; but this cannot be the case, when they see inexperienced boys sitting as members of a Court Martial. It is a very curious circumstance, and one which we ourselves should not have been inclined to credit, if we did not derive our information from an indisputable source, that the junior officers are generally more inclined to pronounce sentences of excessive severity than their seniors. It is therefore highly expedient that in regimental Courts Martial at least, some pains should be taken to chequer the roaster: according to the existing practice a boy-captain and four ensigns may constitute a court, utterly unguided by better experience.

to be flogged for such refusal! This is no fancied case: there is not an officer in the service who has not witnessed instances of this species of injustice; nor are there many who have not suffered a modification of it in their own person. They are not flogged, it is true, for refusing to add ten pounds' worth of coxcombry to a regimental jacket; but they are probably ruined by their tailor if they do, and by their colonel if they do not, "keep up the appearance of the regiment." But to return to the private:—if the signing of the monthly accounts mean any thing, as a guarantee for the just payment of the soldier, for which purpose no doubt it was intended, any compulsion, or fear of compulsion, must defeat the end: but what can the soldier do? he may appeal from the captain who has made the charge to the commanding officer who has ordained it; and after he has received his flogging (c) for disobedience, may, if

(c) We cannot quit this subject without adverting to the often-mooted question of flogging. We have, on consideration of all the arguments on both sides, joined with some personal observation of military discipline, come to the conclusion that this species of punishment, however disgusting, however degrading, cannot safely be abolished; although we are of opinion that it easily might be, and most assuredly ought to be, so restrained and modified as to be applied only to extreme cases, and that, with such rarity, as that the exhibition being unfrequent, should strike the minds of the spectators with the greater horror. In the old time soldiers were so accustomed to see their fellows stripped, tied up, and lacerated under the lash, that a punishment parade made little impression on them, nor were the culprits themselves sensible of any disgrace when they knew that a third or more of the regiment, including some of the best and bravest men in it, had been in turn subjected to similar infliction. In those days the cat was the only recipe of discipline, and he lauded himself as the best commanding officer who most frequently exercised it, with the most unmitigated severity: flogging saved trouble; to have adapted the punishments to the strength, disposition, and temperament of individuals,

would have required an exercise of the reasoning faculty, which some did not possess, and few gave themselves the pain to employ. It was sometime in or about 1811 that the late Duke of York, to whom on all points affecting the condition and comfort of the soldier all praise is justly due, intimated his wish, that the punishment of flogging should be dispensed with in all possible cases, and this intimation was shortly afterwards followed by an order, which restricted the power of regimental Courts Martial to the infliction of 300 lashes; previously five boys could, and often did, sentence a veteran to receive 900. This restriction was no doubt beneficial; but it caused one evil: in abating the quantum of bodily torture it did not sufficiently guard against the frequency of its infliction; officers were content that they did not give much at a time, but they gave it often; the sense of disgrace, therefore, which attaches to the first lash was still further diminished. We have heard of a colonel who, during the march of his regiment to Paris in 1815, made it a practice to halt by the road side, order a drum-head Court Martial, and give from twenty-five to a hundred lashes to every offender, then put on the prisoners' knapsacks, and continue his route. In this manner, and to save further waste of time, he

he dare, complain to the Inspecting General at the next half-yearly review: but is it not obvious, that an intermediate and independent power might prevent injustice, or the imputation of injustice, in such and similar cases, and that without prejudice to good order and military discipline? Why should not the soldier, dissatisfied with his accounts, be permitted to lodge his protest at once with an officer who, being unconnected with the matter in dispute, might deliver on such points a dispassionate and unbiassed judgment? We know that such a proposition would, in the first instance, be highly unpalatable to all officers of rank; for, by a strange operation of the mind, incident to the overwhelming influence of the love of power, it has been seen, on several important occasions, that military men would prefer living under an absolute despotism, to the establishment of any principle of legal protection which, if extended, would in turn interfere with their own exercise of power. The Pasha of Egypt, no doubt, maintains on the same principle, that the sovereign prerogative of the bowstring is constitutionally vested in the Sublime Porte; for if he questioned its existence there, the Beys in turn might seek to limit its exercise at Cairo.

When, therefore, we propose protection for the army, which the most influential portion do not desire, and would rather deprecate, for themselves, we may be accused of visionary speculation or impertinent interference: let it, however, be remembered, that we do not write for the privileged few, but for the unprivileged many—

has had six triangles at once in full employ!! We do not hear that this wanton playing at flogging was ever reprimanded from the proper quarter; but, on the contrary, believe that a West Indian government was the reward of his supposed proficiency in military discipline. We should propose two remedies against excessive flogging, the one in analogy to that which prevails in General Courts Martial as to sentence of death; the other, in the adoption of a rule said to have been acted upon at the Admiralty: 1st, That no soldier be punished by flogging, unless four out of five officers, of whom the president should be one, concur in the sentence. 2d, That the discipline of a regiment and the capacity of its commanding officer be rated in the inverse ratio of the number of lashes inflicted. The latter rule, if impar-

tially adhered to, would all but cure the evil. But while we deprecate the practice of frequent flogging, we must not be understood to advocate the adoption of other modes of torture which the ingenuity of commanding officers has occasionally substituted for it; while we are yet writing, a Coroner's inquest has been held on the body of a soldier, who died within a short period after he had been subjected to one of these inventions, not indeed an absolute novelty, as it appears to have been a modification of the exploded or abolished punishment of the picket. We hope to see a general order prohibiting the adoption of any arbitrary or capricious modes of punishment; mankind is quite learned enough already in the science of torture and destruction, that which we have to study is the doctrine of prevention.

less for the officer than for the soldier—less for the soldier than for the people. On merely military grounds, we might never have published our views on this subject; but believing that the due administration of justice in the army would be a main security that the army should never become dangerous to the administration of justice to the nation, we conceive it to be a point of infinite importance to teach the soldier, by practical experience in his own person, the blessings of equal laws, that he may never be made the instrument of their destruction. It is in time of peace, in time of tranquillity, when no personal interest, passion, or prejudice, can be excited or even suspected, that such questions can best be raised; can most safely be discussed, and most satisfactorily be decided.

On these, among other grounds, we advocate the establishment of a permanent class of lego-military officers, whose constant duty it may be to guard the administration of justice in the army. This will be denounced as *imperium in imperio*, a fancied anomaly, against which military men are in the habit of protesting very vehemently, without remembering that the *imperium* of the law is the safety of the empire.

The incidental advantages which may be derived from attracting the attention of young officers to legal study (their own interests will prevent their becoming litigious quibblers) are numerous. Among the most important, is the qualification which such officers would acquire for the semi-civil duties to which they, at a more advanced period of life, may be appointed—as colonial governors and secretaries; not omitting to mention the occasions on which, in the more immediate exercise of military duty, some legal astuteness, a quality more necessary to diplomacy than diplomatists by birth are willing to allow (d), might be of great benefit to the service. It

(d) As the eldest sons of peers become, *defuncto patre*, hereditary judges, so the younger sons are held to have an intuitive knowledge of the *jus gentium*, and other studies necessary, or vulgarly supposed to be necessary, to diplomacy. The great object to be attained in the choice of Ambassadors is not the protection of British interests at foreign courts, but the protection of the foreign Secretary's interest at our own: for this purpose, the younger sons of noble families are most efficient ministers. A similar rule appears to govern the colonial department. If, under any of those extraordinary political changes which puzzle calculation, the system should be changed,

it will become a question whether the best and cheapest mode of forming an effective class of colonial and diplomatic officers will not be found in the improvement of military education, and in opening promotion on the score of merit, to the exclusion, as far as possible, of wealth and aristocratic interest. A mere soldier, we are ready to admit, makes a bad envoy, and a worse governor. But considering the opportunities which military men possess, in the course of actual service, of becoming more intimately acquainted with mankind, than can be possessed by any class of merely theoretical students, we are of opinion, that if their minds were duly prepared by education and

has been a common observation, that whenever our commanders attempt to treat, they lose by the pen more than they have gained by the sword. This would not be the case if their minds had been trained by better study than Dundas and the Rules and Regulations.

We are not, however, so sanguine as to anticipate that any change in the constitution of the Judge Advocate General's office can remove many of the objections which attach, and some of which must always attach, to the administration of Military Law. Tribunals of occasional jurisdiction must ever be imperfect, since they must want (and in the case of Courts Martial it is highly desirable that they should want) that daily practice and converse with business which can alone give certainty to the proceedings of any Court; they must want also the wholesome and restraining influence of a permanent bar; and here we must observe that the presence of Counsel at a Court Martial according to the present practice is little better than a form; since he is not permitted to put his questions *viva voce* to the witness; but must first submit them in writing to the Court, in which process the spirit of examination is too often lost, and its object towards an unwilling or prevaricating witness utterly defeated by injudicious remarks or discussion in his presence. When a point is to be argued, the restraint, frequently imposed, is yet more detrimental to the substantial execution of justice. Officers, when sitting as a Court, should learn, for the time at least, to suppress their impatience of legal forms, and if they have not themselves the knowledge requisite for the due guidance of their proceedings, should listen patiently to those who may impart it; the presence of a qualified Judge Advocate will always be a sufficient guard against any attempt of Counsel to mislead the Court,—such attempts are rare,—but as the ignorant are ever suspicious, Courts Martial, Coroners, and Justices of the Peace constantly betray an irritation at the presence of the Bar.

But though they cannot even approximate the regularity of our ordinary tribunals, the proceedings of Courts Martial may be very materially improved. The first and most necessary step is to render them, as far as possible, independent of all external influences; the King's name should only be heard in the warrant for their sitting, or in his exercise of the prerogative of mercy; royal confirmations of sentences, and royal censure of judges, are a bad part of the system: we do not witness them in one branch of the

properly stimulated by the hope of advancement, they might fill those appointments with benefit to the country and honour to themselves,

which they now too frequently disadvantage by ignorance, idleness, or tyranny.

service, and cannot believe them necessary in the other. There is indeed a very extraordinary difference between the military and naval system in respect of these points. Five officers, sitting on a naval Court Martial, are enabled to pronounce their sentence in open court; and if it be judgment of acquittal, the ceremony of the President's publicly returning the sword of the accused, affords the prisoner some consolation for the undeserved (though perhaps necessary), hardships of his arrest and trial. Thirteen military officers, who might be supposed equally worthy of the confidence of their sovereign, who in public opinion are less liable to the imputation of despotic principles, are not only restrained from exercising the function incident to all other courts, of openly and honorably avowing their judgment; but are bound by obligation of their oath not to divulge their sentence, though it be an acquittal, till such sentence has been approved of by his Majesty, or some officer authorized by him. We are utterly at a loss to conceive the grounds of this distrustful and therefore dishonorable restriction on the one service, which is not equally applicable to the other. The exigence of naval discipline, indeed, may in some cases warrant the more immediate execution of the sentence of the court; while on the other hand a military punishment may be more safely delayed; but this reason cannot apply to acquittals: if the naval prisoner is allowed to walk out of the cabin a free man, the instant his innocence is ascertained, we can conceive no possible reason, why the acquitted soldier should be marched back to the guard-house, the hot, sweltering guard-house of St. Vincent's or Pondicherry, till his enlargement is ratified from Barbadoes, Madras, Calcutta, or Whitehall!

An officer in a regiment quartered in Sicily was tried by a Court Martial, on a charge of murdering an inhabitant of the island: in his defence he proved that he had been robbed, and that he had killed the Sicilian in self defence; the Court acquitted the prisoner, but this of course was not made known to him. The commander of the forces, dissatisfied with the sentence, sent it back to the Court for revision;—it was revised, and the acquittal confirmed; still the prisoner was kept in ignorance of his fate. The proceedings were then sent to England, the officer being in the mean time closely confined, and that under circumstances of so much vexatious privation, that he was at last provoked to a breach of his arrest: for this offence he was tried, and dismissed the service. So that by the time that his Majesty's approval of the acquittal arrived in Sicily, the unfortunate gentleman had been deprived of his commission for an offence growing out of his unjustifiable detention. This we admit was an extreme case; the magnitude of the imputed offence fully justified the imprisonment pending the first proceedings and their revision; but after the re-

vision, when it had become impossible that the prisoner could be subjected to any direct punishment, admitting, for argument sake, that there might have been something culpable in his conduct, which might have warranted his removal from the service, it was most unjust to retain him under close arrest, and yet more so to keep him for nearly twelve months in ignorance of his sentence, uncertain whether he had not been condemned to suffer an ignominious death. This, we repeat, was an extreme case; but many others, and of excessive hardship, might be cited in support of our position that, in cases of acquittal, at least, the sentence of a military Court Martial should be pronounced *instanter* and in open court, without being subject either to revision or confirmation.

This power of revision is subject to much abuse, as it authorises a direct interference of the executive, or those exercising its authority, with the administration of justice. The Mutiny Act provides, indeed, that the sentence of a Court Martial shall be only once revised; but this provision may be evaded. In 1816, a soldier quartered at Valenciennes, was found guilty of having raised a window with his bayonet in the night time, and by putting in his hand stealing some bottles of mead. This was called burglary;—by what fiction the common law of England was enabled to march under her flag into France we know not; but it will be seen in the sequel, that in the opinion of the gallant Field Marshal and learned Judge Advocate, the statute law also may wander from Guernsey, Jersey, Alderney, Sark, and Man, for the better execution of culprits in the French Netherlands. (e)

The Court by which this prisoner was tried, deeming, no doubt, that they were dealing with an offence against military discipline, under Art. 4, of the 24th Sec. of the Articles of War, and not with a capital felony under the common or statute law of England, sentenced him to a severe military punishment. This sentence was sent back for revision, with something of reprimand on the Court for not having known that — *years' transportation!* was the proper punishment for burglary. The sentence was altered accordingly, but had scarcely been transmitted to head-quarters, when it was discovered, that by the law of England, sentence of death and not of transportation should have been awarded against the offender. The Commander of the Forces excused himself by the want of law books; though but a few days before he had re-

(e) Instead of augmenting punishment by carrying into a foreign country the severity of our statutes, the practice of the law has allowed some latitude to aliens committing offences here: "Thus, a French prisoner, in-

dicted for privately stealing from a shop, was acquitted of that by the direction of the judge, and found guilty of the larceny only. *Forst.* 188.

primanded the Court, who could not be supposed to have been better furnished with a library; the defence of the Deputy Judge Advocate is unknown to us. The result was that the Court Martial was once more assembled, with a recommendation to rescind their former sentence, and substitute the punishment of death, accompanied, however, with a promise that the man should not be executed!!

We cannot state how many members of the Court resisted this illegal proceeding of a second revision: we can only hope, that some had the manliness to oppose it, and the good sense and good feeling to withhold their concurrence in a sentence of death, on the mere assurance that it should not be executed. The result shews that the majority were more compliant.

The deductions from this case are sufficiently obvious, we shall only take the opportunity of warning our military readers against a practice which was, and we believe is, exceedingly prevalent in the army, that of complimenting commanding officers with severe sentences, in order that they may have the grace of remitting the excess. We deem an officer guilty of judicial perjury who sentences a prisoner to a single lash more than, on his oath, he believes ought to be inflicted. It is bad policy to exalt the mercy of the executive, at the expense of the judicial character.

It unfortunately happens also, that this power of revision and confirmation has not usually been exercised in a manner calculated to remove the objections which may obviously be taken to such an anomaly: we scarcely remember an instance in which the propriety of a condemnation or the severity of a sentence has excited animadversion from the military authorities; while, on the other hand, we remember frequent examples of Courts Martial reprimanded for lenity, and of punishments augmented by prerogative: we have heard of an acquitted prisoner being deprived of his commission, and of a successful prosecutor dismissed the service.

These blots in military jurisprudence probably arise from an error too common in government. The advocates of absolute power contend, not only that "it is excellent to have a giant's strength," but they insist, that it is expedient "to use it as a giant;" with them moderation is imbecility, severity vigor, perpetual interposition of authority the only mode of evincing its existence. "*Nec Deus interit*" is a maxim which they have never heard or never regarded; their supreme authority must be manifested in every act and in every hour, the mess-table or the roll-call, the shape of a button, or a sentence of death, must be equally *par ordonnance*. Accustomed to this unceasing intermeddling in matters, many of which do, and some do not, require unremitting superintendence, they have forgotten that absolute independence is essential to the due course of justice. More evil is created by the

reprimand of a Court Martial, by diminishing the confidence of the men in the judgment and integrity of their officers, than can possibly be compensated by the increased severity of any future proceeding. While on this head, we must not omit to notice a practice which, though rare, ought not to escape the severest reprehension. The members of a general () Court Martial are bound by oath, that they "will not, at any time whatsoever, disclose or discover the vote or opinion of any particular member of the Court Martial, unless required to give evidence thereof, as a witness, by a Court of Justice or a Court Martial, in a due course of law." Will it be credited that in the face of this just and necessary provision of the law, it could enter into the contemplation of a general officer, dissatisfied with a sentence, to require each member to disclose his own opinion, and to state his reasons in writing for forming it; yet we can vouch for the fact, and also, that when we expressed our surprise at such an order, we were assured that the requisition was not without a precedent.

There is one point in which the practice of general Courts Martial

() It is singular that this provision has not been extended to Regimental Courts Martial, where some precaution of the kind is most necessary. In a General Court, composed of course from many corps, the prisoner and prosecutor will often be, and ought if possible always to be, comparative strangers to the majority of the members: the danger therefore of personal animosity, which is one of the strongest grounds urged for the oath of secrecy, is less in a general than in a regimental court, when all the individuals concerned are and must remain in constant intercourse; numerous feuds arise from this circumstance; the officer who prosecutes often feels himself offended, as by a personal imputation, when his prisoner is acquitted; and as the prosecutor is, in most cases, virtually the commanding officer, an undue influence may be exercised or suspected, over the members who are subject to his future favor or resentment. It is true, that the security of an oath of secrecy among five men whose general tenor of opinion may give a clue to their sentences, may not be of great avail; but it would be in some degree useful, by preventing the open and official notice of the

judicial conduct of the members, which is now too often assumed by those who are displeased at the lenity of their sentences.

It was not till 1805 that the members of a Regimental Court Martial were sworn at all; and the clause then introduced for assimilating the practice was warmly opposed. Among other things it was urged, that men of honor would act as impartially without oath as when sworn; this might have been a good reason for abolishing military oaths altogether, but it was none for refusing to the soldier, under a regimental tribunal, that security which he or an officer would have before a General Court Martial. Let us here take the opportunity of saying that, in proposing safeguards to the administration of military justice, we mean no imputation on the honor of officers of the army; but as we cannot compliment them by the supposition that they alone are free from the influences of human nature, we think the best mode of securing their honor is to put it beyond the range of suspicion, not by vain praises of their integrity, but by the removal of all probable grounds of self-interest.

might be beneficially imitated in criminal cases by our ordinary tribunals: when the case for the prosecution is closed, the prisoner is usually allowed an adjournment to the following day at the least, for the purpose of preparing his defence. We advocate this course, because we have heard of many instances in which a prisoner has been improperly condemned (sometimes, indeed, as improperly acquitted,) where a few hours of undisturbed reflection might have enabled him to point out, or his judge or jury to discover, the insufficiency of the evidence. Additional consumption of time, and the consequent detention of juries, would no doubt be urged against this dictate of humanity; nor can we expect to see it adopted till Parliament, sufficiently profuse in other expences, shall spare the expence of a regiment of dragoons, in order to afford the country a sufficient number of judges for the execution of its laws: when that time arrives, we shall recommend our grand-children, should they live to see it, to urge, in addition to other legal maxims, that no man shall be hurried into his defence, till he has had a fair opportunity of considering the full nature of the charge, and the bearings of the evidence adduced against him.

While we are yet writing, another point of commendation suggests itself to us,—the publicity of the proceedings. By Art. XI, sec. 16, of the Articles of War, and by § 28 of the Mutiny Act, Courts Martial can sit only between the hours of eight and four, a restriction obviously in favour of publicity; and so strict is the construction of military men that a Court Martial is an open court, that they actually sit with their doors wide open; and would, no doubt, deem the proceeding irregular if they should accidentally have been closed. Men of honour feel no inclination to conceal themselves and their actions from the public view. The bar of the House of Peers, guarded as it is by forms and ceremonials, is thrown open during judicial proceedings to all male (g) persons, who are willing to risk the loss of their umbrellas for the sake of watching the administration of justice; but the back parlour of the Cat and Bagpipes is closed, if it should please his worship, the Coroner, to shroud his inquest in obscurity.

(g) Females are carefully excluded, except when wanted as witnesses.—A lady recently wished to hear her appeal argued before the House, and insisted that, as a party interested, she had a right to be present: her counsel, however, could not venture on so delicate a question; but, by their influence with the door-keeper, procured her a peep at the Chancellor from behind the red curtain: she, satisfied by the fulness of

the noble lord's wig, and assured by the *bonhomie* of his manner, soon retired in perfect confidence of success. It is said, that this ungallant regulation originates in the fear that, should their fair countrywomen be admitted below the bar, the younger peers would occupy too much time in the display of their eloquence. *In vitium ducit culpæ fuga*.

Is not some stimulus occasionally wanting to the noble lords?

The augmentation of punishment after sentence is so contrary to all preconceived notions of justice, so glaring an inversion of the real royal prerogative of grace and mercy, that we cannot but wonder at the establishment of such a practice, and still more at its unquestioned continuance. A Court Martial sentences an officer to be reprimanded,—the King is advised to dismiss him the service. The advocates of absolute power say that the Crown has the right of dismissing its officers without trial, and therefore may dismiss them after sentence. If this doctrine be true, it would be better to convert a Court Martial into an inquisition,—let them find the facts, and let his Majesty's advisers draw the conclusion. But, as long as you flatter prisoners with the forms of judicial trial, is it fair, is it prudent, to tell them,—It is true that the tribunal before which you were heard decided on the minuteness of your guilt; but, the secret authority, by which you were not heard, may augment the magnitude of your punishment?

Equally unjustifiable, equally impolitic, are the pains and penalties suspended, and with no equal hand, over prosecutors. (h) We have known of more than one instance of the same officer being thrice brought to trial and thrice acquitted (or so slightly reprimanded as to be tantamount to acquittal), on charges brought against him by his commander. Was this commander punished? No. Was any disapprobation of his conduct signified? No. What would have been the probable course if the captain had accused the colonel, and had failed? He would have been dismissed the service. Thus, superior officers, in whom delinquency should be the more severely punished, enjoy a practical impunity; for none will dare to stand forth as their accusers. And thus true discipline is sacrificed to a false notion of subordination. It should be part of the judgment of a Court Martial, as it is of an election committee,

(h) An extraordinary instance of this kind occurred in Sicily in 1810-11. The commanding officer of a regiment was convicted, on the prosecution of a quarter-master, of having *flogged a man without a Court Martial*, and of having signed false returns; for offences of such magnitude he was sentenced to be suspended from rank and pay for one year! In the course of cross-examination, it was elicited from the prosecutor that he had some quarrel with the prisoner, and, consequently, that his prosecution was not solely influenced by regard to the service. His Majesty was advised, when confirm-

ing the sentence of one year's suspension on Colonel ——— for flogging a soldier without a Court Martial, and for signing false returns, to dismiss Quarter-Master ——— from the service, for having been influenced by improper motives in bringing his commanding officer to justice!! We very much doubt whether the learned and right honourable gentleman, who then filled the appointment of Judge Advocate General, could justify, on any principle of justice, public policy, or knowledge of human nature, the advice for which, even if not given by him, he was officially responsible.

that the prosecution is or is not malicious, frivolous, or vexatious. In the one case, some degree of penalty should follow, whatever might be the rank of the offender; in the other, no judge advocate, general, or commander in chief, should venture to advise a censure or punishment which a more competent authority (more competent, because better informed on the subject) has abstained from inflicting.

We have thus noticed, very cursorily, for our limits will not admit of detail, a very few of the dangers and difficulties with which a military prisoner is beset when brought to trial. We have not cited many cases in illustration of our observations; and those which we have quoted are, for obvious reasons, anonymous; but the reader may rest assured that they are many, and would be yet more numerous, but that there are other and easier modes of getting rid of individuals obnoxious to power than trial by Courts Martial. Vexatious arrests, petty annoyances, forced resignations and exchanges, secret and *ex parte* reports, and consequent dismissals without trial, are the ordinary instruments of military oppression. Against these the law affords no protection,—the party aggrieved has no appeal: he has nominally the right of memorial to the Sovereign; but if his case ever reach the Royal ear, which is much more than doubtful, it must be conveyed through the same channel by which the original injustice was committed. He cannot be heard for himself. If he remonstrates at the Horse Guards, he offends the dignity of a secretary; if he petitions either House of Parliament, he is encountered by the fiction of prerogative; the King's name is arrayed against him, and the cabal of an under secretary, a colonial governor, or the lieutenant-colonel of a regiment, is made an emanation from the royal will. We are very far from speculating on any form of military law, or any perfection of a military code, which should absolutely defend the army from the abuse of power; we are too well aware that the exigencies of discipline may require occasional latitude: that which we protest against is, the application of extraordinary powers to ordinary circumstances. It is, no doubt, necessary that, in time of war or open rebellion, in the face of an enemy, or in the heat of civil dissension, the Crown should have the power of dismissing *instantly* any commander whose suspected fidelity might render such an extreme course justifiable, on the ground of immediate and urgent necessity; but it is not equally clear, and must require no ordinary ingenuity to maintain on any ground of reason, that the same course is either expedient or justifiable in time of peace and tranquillity.

Lord Palmerston, in the last debate on Colonel Bradley's case, which we are happy to see revived, is reported to have said,—
“As to the dismissal of officers without trial by court martial, he

hoped the House would not give their sanction that the King's servants in the army should hold their commissions by any other authority than his Majesty's commands, or longer than it was his Majesty's pleasure that they should hold them."

Strange as it may appear to his Lordship, we certainly do avow a wish not to restrain the King's power of dismissing his officers, for, *mero motu*, the King would not dismiss one officer in half a century; but to make his Majesty's military advisers responsible for the use or abuse of the powers virtually exercised by them. The case which elicited his Lordship's remark has excited much public attention; and will, as we hope, induce a serious inquiry into the defects imputable to the administration of military justice. Would it be credible, had not this case arisen, that, on so simple a point as the authenticity or non-authenticity of a document, there should be no legal mode (Lord Palmerston will add, no constitutional mode) of putting the question fairly at issue, and of obtaining upon it a competent and judicial decision.

We must not, however, dismiss the argument, if such it can be called, of the noble Secretary, without adverting to one point in his speech which makes strongly, upon principle, against the continuance of the power claimed for the Crown; we mean the purchase and sale of commissions. Lord Palmerston dilates upon the tender mercy of allowing a dismissed officer to sell a commission which he had not bought. Let us reverse the case, and suppose that an officer, who has become obnoxious in the House of Commons, is dismissed the service after having purchased every commission, and that the royal licence to sell what he has bought is refused him, what is this but a forfeiture of property at the mere will of the Crown? Is such a forfeiture consonant with the spirit of the constitution? The purchase of a commission has now become, most unfortunately for the true interests of the army, (i) a mode of investing money: a retired tradesman may now buy a half-pay ensigncy by way of a well-secured annuity; but let him beware which way he votes, if he happen also to be a freeholder and a candidate from the Horse Guards stands for his county. He may entertain the highest veneration for the personal virtue of the Sovereign; he may repose the

(i) A similar system is now proposed for the navy, under the pretence of affording to the senior officers an honourable mode of retirement, and to the juniors due promotion, which, during the stagnation of peace, cannot otherwise be afforded them. Those who, on the ground of this assurance, believe that the measure will be merely temporary, have not well observed the tactics of go-

vernment, temporary or local expediency are constantly made the grounds of permanent and general measures. They may, therefore, very shortly expect to see the aristocracy of wealth competing at the Admiralty with the aristocracy of birth: opposed to this double influence mere talent will have little chance of promotion.

firmest reliance on his moderation; he may believe that, "to cause law and justice in mercy to be executed in all his judgments," according to the terms of the coronation oath, is the first duty of the Sovereign; but these reliances will stand him in little stead: if he offend an under secretary, he may possibly bid farewell to his annuity.

We do not here allude to objections to this system on the ground of political influence: they are sufficiently obvious, but they can seldom apply except in the cases of the rich and powerful. These cases, also, are subject to the best tribunal of appeal, public opinion; it cannot reverse the decree, but it brands the precedent. Our present object is, to protect the humbler ranks of the army, not from the direct power of the Crown, but from the machinations of intermediate officers: it is by these that injustice is perpetrated, while the King's name is used as a shield for their offence. Let those who doubt the truth or policy of our observations make diligent inquiry among their military acquaintance: let them ask the number of cases of forced resignations or peremptory dismissals, (*k*) and they will find the evil to be of greater magnitude than they can possibly have anticipated. For ourselves, we do not invite communications on this head, for we dislike paying postage, and have papers enough upon our table: nor is it likely, indeed, that we shall ever revert to this subject; (*l*) but if we did, we should find no difficulty in laying open to the public a series of abuses, a series of hardships and privations, inflicted without form of trial, without hearing the accused; or, if hearing the accused, overbearing his defence, which would excite the public indignation in no ordinary degree against those who have abused the royal confidence and perverted the royal authority. (*m*)

(*k*) Mr. Hume is reported to have "complained of the severe exercise of the prerogative of the Crown in dismissing officers without affording them the opportunity of a Court Martial. The number of officers dismissed in this way within the last five and twenty years amounted to no less than *five thousand and ten*. Such a system, he had said on a former occasion, reduced the condition of an English officer to that of a slave, though he would not now repeat it, as it was unpalatable to military gentlemen; it was, nevertheless, the fact." June 8, 1827. The honorable member might have quoted a great legal authority in support of his proposition. "*Miseræ est servitùs ubi lex est vaga et incognita.*"

(*l*) Except indeed that as the king of France, on the last opening of the Chambers, announced the preparation of a military code, we may have occasion to compare our lego-military institutions with those of our great rival: we will not hope for any superiority as the result of the comparison; but rather that their increasing liberality may serve as a stimulus to our own.

(*m*) Some cases of summary dismissal by the Board of Ordinance have reached us from Ireland; if they be correctly stated, the late Master General has yet to learn that there are modes of reform which, by their perversion of the established order of justice, operate more evil than they cure.

ART. II.—GRAND JURIES.

THE jurisdiction possessed by Grand Juries has usually been considered by Englishmen to be highly useful in the administration of criminal justice; yet, it has long continued to be peculiar to the jurisprudence of this country. An examination of those parts of our judicial establishments which differ from the corresponding institutions of our continental neighbours must be both interesting and useful. For, if they really possess the excellent qualities which have been ascribed to them, an examination of their merits can tend only to rivet them more strongly in our esteem, and to recommend them to the adoption of foreigners; whilst, on the other hand, if we appear to have been blinded by national prejudice, or by an unreasonable respect for established institutions, the discovery of our error may lead to useful and practical improvements.

Whatever may be the opinion commonly entertained respecting the utility of Grand Juries, it has certainly not been the result of much discussion or inquiry; as we believe there never has appeared any examination of the merits of the institution, or any inquiry into its effects upon the administration of justice. It has, indeed, been made the subject of much vague commendation; and it has been lauded as one of the most precious ornaments of the wisdom of our ancestors; and as one of the principal safeguards of the liberties of Englishmen. But the subject has never, to our knowledge, been systematically treated; nor has the utility of the institution been considered, either with reference to those general principles of human nature, which form the basis of the science of jurisprudence, or as exemplified by those particular facts, which are every day occurring, and which serve to illustrate the working of the system.

Even Mr. Justice Blackstone does not enter into any examination of its merits, but contents himself with observing that, "So tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial." (a)

Now, if to be "tender of the lives of the subjects" be the sole, or the principal merit of a system of criminal law, then would the system be improved, by requiring unanimity in the grand jury as well as in the petit jury, or by any other obstacle being thrown in

(a) Blackstone's Commentaries, iv. 306.

the way of the administration of justice. The law would be still more "tender," if one-half of the persons accused were to be set at liberty, by lot, without being put upon their trial at all; but this would scarcely be considered a subject for commendation. To say, therefore, of the system, that it is "tender of the lives of the subjects," (i. e. of accused persons, whether guilty or innocent), is to say nothing, or worse than nothing. It ought to be shown that it conduces to the great end of the administration of justice; viz. the discovery of the truth, with a view to the punishment of the guilty, and of none but the guilty. Nothing can be more absurd, than to praise a system of law as giving advantages, either to the prisoner on the one hand, or to the prosecutor on the other. The end of criminal law is the protection of society against crime; and this object can be accomplished only by a system calculated to elicit the truth without regard to the parties, and thus to secure the punishment of guilt and the protection of innocence. We shall proceed to examine how far the institution of Grand Juries seems to conduce to this important end.

We will begin by stating shortly the duties and constitution of a Grand Jury, though they are probably well known to many of our readers. A Grand Jury consists of not less than twelve, nor of more than twenty-three persons, who, in counties, are summoned by the High Sheriff; and, at assizes, are usually magistrates or landed proprietors, or, as Blackstone expresses it—"Gentlemen of the best figure in the county." (b) At the quarter sessions, Grand Juries are in general composed of farmers and tradesmen. To this tribunal it is necessary that every bill of indictment should be preferred, for the purpose of determining whether there are sufficient grounds for putting the accused party upon his trial. For this purpose, the Grand Jury have the power of examining all the witnesses for the prosecution; but neither the pursuer nor the witnesses for the defence are allowed to appear before them. All their proceedings are in private, and every member is sworn "to keep secret the king's counsel and that of his fellows." After the examinations are concluded, the jury proceed to vote upon the bill; and, whatever may be the number who attend, it is necessary, in order to put the prisoner upon his trial, that twelve at least should support the bill.

This circumstance of twelve votes being in all cases required to sanction an indictment, is certainly one of the most striking anomalies in the constitution of this tribunal. If the whole of the twenty-three members of the Grand Jury attend, each bill may be carried by a simple majority; but in case only twelve happened to be present, absolute unanimity is required: so that in cases of doubt

(b) Commentaries, iv. 302.

as to the sufficiency of the evidence, the decision of the question very frequently depends solely upon the number of the jurymen who happen to give their attendance. In counties where there is not a large resident gentry, a full Grand Jury of twenty-three persons is rarely obtained; and even in populous counties, the evil is very frequently experienced, because a part of the jury are often absent, either in consequence of their being summoned to serve upon special juries, or from some other cause: and, provided a sufficient number be present to proceed with the business, the attendance of the rest is not very strictly required. Having noticed this anomaly in passing, we shall proceed to consider the general effect of the institution upon the administration of justice.

It is probable that injustice is not often committed in consequence of bills being improperly found by Grand Juries; or, at all events, the evil is slight; because the accused party will, of course, be acquitted when put upon his trial. But it is of much greater importance to inquire, whether the ends of public justice are not frequently defeated by bills being improperly ignored; and to consider, how far it is desirable to entrust a body of persons, constituted like a Grand Jury, with a *veto* upon the administration of criminal justice. This becomes a subject for still more serious consideration, when we recollect that their proceedings are in secret, and that they are consequently altogether free from the control of public opinion; a control which is exercised with such utility and effect over most of our institutions. It is now universally admitted, that public opinion, as expressed through the medium of the press and other channels, exerts the most powerful influence over the proceedings of our magistrates, over our courts of law, and over the legislature itself. But the members of Grand Juries are not only independent of this beneficial influence, but they are also, in consequence of their numbers, entirely free from that control which arises from individual responsibility. It becomes, therefore, most important to determine, whether the power in question can be safely entrusted to so irresponsible a body; or, whether those evils have been felt in practice, which might have been *a priori* apprehended.

The very circumstance of the secrecy of the proceedings of Grand Juries may lay us under some difficulty in illustrating our remarks, because we cannot refer to any existing records. A few facts may, however, be sufficient to exemplify our arguments.

We shall treat, first, of those errors which are likely to be committed by Grand Juries, in consequence of ignorance or mistake; and, secondly, of those which may be supposed to arise from bad intention or sinister interest.

First.—It may, perhaps, be imagined, that the members of Grand Juries generally possess a sufficient knowledge of the law to prevent

their falling into very serious mistakes. But we have reason to believe that this is a most erroneous opinion, and that not a year passes in which great numbers of bills are not improperly ignored, solely in consequence of their ignorance of the law. An instance, indeed, has very recently occurred in this metropolis, in which a Grand Jury showed themselves to be unacquainted even with the simplest of the rules which ought to regulate their own proceedings. We take the following extract from a report in the *Morning Chronicle* of May 31st, 1827.

"LONDON SESSIONS, MAY 30.—The Recorder charged the Grand Jury. He wished to direct their attention to a circumstance which appeared to have been, in some degree, misunderstood—that before a true bill could be found, it would be necessary that twelve jurors should be of such an opinion, and not a majority of the jury."

We have heard of an instance of similar ignorance, which occurred some few years ago in a populous midland county. It had been the custom in that county, from time immemorial, for the Grand Jury to return bills by a majority of votes, whether that majority consisted of twelve or not; and, when a gentleman was summoned upon the jury, who happened to be acquainted with the state of the law upon the subject, and who attempted to communicate his information to his colleagues, he is said to have found them totally incredulous, and to have been obliged to call to his aid the authority of one of the gentlemen of the bar, before he could succeed in convincing them of their error. Now, if two Grand Juries, consisting, the one of the most respectable merchants and traders of the city of London; the other, of country gentlemen who had enjoyed the advantages of a liberal education, and who, as magistrates, must be supposed to have made the law, in some degree, their peculiar study—if Grand Juries, thus constituted, were ignorant of the principal rule which ought to guide their own proceedings, what errors must we suppose to be committed by Grand Juries at quarter sessions, who are in general either uninstructed farmers, or shop-keepers in country towns.

But it may, perhaps, be maintained, that no knowledge of law is necessary for Grand Juries; and that they will be enabled to discharge, sufficiently well, the duties of their office, if they will only consult their own common sense; or, in other words, if, in examining the witnesses, and in giving their votes, they will consent to be guided by the same ordinary rules which they are accustomed to adopt in private life, in the examination of any matter of fact: and, in this opinion, we are disposed, in some degree, to concur. But, unfortunately, the members of Grand Juries are seldom content with so simple a rule of procedure: they are too apt to imagine that they possess some knowledge of law, and to apply any legal maxims which they may happen to have heard, without

sufficient caution and discrimination : and thus, from their desire to obey the law, they fall into absurdities of which the law never was guilty. To take, for example, the subject of the admissibility of evidence. They have heard that the law rejects the evidence of parties who have a pecuniary interest in the case ; that it admits, with great suspicion, the testimony of accomplices ; and that, in some cases, it receives with distrust, or even rejects, the confession of the prisoner himself : but, when they come to apply these rules in practice, they often betray the limited extent of their knowledge and the confusion of their ideas. Thus, we have heard of Grand Juries in which it has been maintained, that the free and voluntary confession of a prisoner was to be treated exactly in the same manner as the evidence of an accomplice ; and in which bills have accordingly been ignored, solely because the Grand Jury have refused to act upon such confessions, unless supported by other evidence. We have also heard of cases in which Grand Juries have required a very absurd degree of strictness in the identification of the stolen property, and have insisted upon evidence which certainly would not be required in an ordinary court of justice. These are errors into which members of Grand Juries are, from the most laudable motives, peculiarly liable to fall. They have heard that it is their duty to prevent any prisoner's being improperly put upon his trial ; and they have been told that the institution, of which they form a part, is one of the principal safeguards of the liberty of the subject. Accordingly, with the best and most humane intention, they have been too ready to search for some defect in the evidence, or for some rule of law, which may justify them in ignoring the bills which have been presented to them. When, indeed, we recollect, that the English law of evidence is, in itself, by no means so simple or so favourable to the elucidation of truth as might be desired, can we be surprised that errors should continually occur, when it is misunderstood and misapplied by those who are not initiated in its mysteries !

These are not the only mistakes into which Grand Juries are apt to be betrayed : but our limits will not allow us to proceed at much greater length into this part of our subject. We will, therefore, content ourselves with observing, that we believe cases to have not unfrequently occurred, in which Grand Juries have been misled by the terms employed in indictments. Thus, for instance, when they have seen a crime charged to be committed "with malice aforethought," they have not understood this expression to imply merely the *wilfulness* of the act, or the bad intention of the party committing it, but they have thought it necessary that the evidence should disclose something like *previous malice* in the ordinary sense of the word.

On an unprejudiced consideration of this part of our subject, we

shall cease to be surprised that Grand Juries have frequently fallen into errors in consequence of their ignorance of the law. But it must excite our astonishment, that the administration of an important part of our criminal law has been entrusted to a body of persons who *may be*, and very frequently *are*, utterly ignorant of its principles; who are unassisted by the presence of any legal adviser; who, after they have once erred, have no means of discovering their mistake, but may continue to commit the same error year after year; and who are destitute even of that motive for informing themselves of the law, which the publicity of their proceedings or individual responsibility would supply. And, yet, to a body of persons thus constituted, is entrusted an effectual *veto* on the administration of criminal justice; and, in many cases, to any three, two, or even one of their number.

Secondly, we are to consider the effects of the influence of bad intention, or sinister interest, upon the conduct of Grand Juries: and, here, we wish to be understood as not imputing to the members of those bodies, or to the class to which they belong, that they are actuated by the principle of self-interest in a higher degree than the rest of the public. It is a trite observation, that the possession of irresponsible power necessarily leads to its abuse; and we should be wasting the time of our readers were we to attempt any proof of so generally received an axiom. It may, however, be objected, that Grand Jurors are in general not liable to this perverting influence; because they have the same interest as the public at large in the punishment of the crimes which come under their cognizance. But it must be recollected that they are, in general, persons of large property and of extensive connection, and that they are summoned from every part of the country; so that it is scarcely possible that, amongst the various cases which come before them, there should not be some in which some of the jury have an interest, either direct or indirect. We recollect having heard of a case, not long ago, in which some poachers were indicted for an assault upon the gamekeepers of a gentleman of large fortune and great respectability. Not only was this gentleman himself a member of the Grand Jury, but we have reason to believe that he actually attended in his place during the whole of the investigation; so that he appeared in the double character of a party and a judge. We have no reason to suppose that any injustice was in this case committed. But suppose the case to have been a little different: suppose that the gamekeepers had been indicted for an assault upon some suspected poachers, we would then ask, whether it is desirable that a gentleman should be thus enabled, with the assistance of a few of his friends, to screen his servants from public justice? And even if a Grand Juror, so interested, should have the delicacy to retire during the investigation, is it desirable that a

case of this sort should be decided by an irresponsible and secret tribunal, consisting of the intimate friends and acquaintance of one of the parties concerned?

But it is not to the private interests of individual jurors that we ascribe such bad effects; but to those more imperceptible, and, consequently, more dangerous motives, which cannot fail to operate upon Grand Juries, as belonging almost exclusively to a particular class of the community. It is well known that the members of Grand Juries, in general, belong to what is called the *landed interest*; that, consequently, their sympathies and prejudices must usually be enlisted in favour of that class; and that, on all the great political questions which agitate the country, they will in all probability be attached to the aristocratical party. It is scarcely necessary to add, that there is hardly any case in which some political principle may not be involved; and that it is upon the principle of excluding the influence of political motives upon the minds of the judges, that the application of trial by jury, to all causes in our courts of law, whether civil or criminal, can be best defended. Cases are every day occurring, especially during periods of political excitement, in which Grand Juries are liable to be influenced by motives of this kind. Take, for example, the two great questions of Parliamentary Reform and the Corn Laws. How many cases are there, which may come before a court of justice, with which these subjects may be connected. Suppose, for instance, that a public meeting is held for the purpose of petitioning parliament on one of these topics; and suppose that this meeting is illegally dispersed by the police or the military; and that bills of indictment are afterwards preferred against the persons who have thus improperly interfered; it could scarcely be maintained that a Grand Jury, who might probably be influenced as well by political prejudices as by local party animosity, would be a proper tribunal for deciding upon the propriety of the prosecution. Unless freedom from all responsibility, united with a strong bias to one side of the question, be qualities desirable in a judge, it is impossible to conceive that, under such circumstances, justice can be fairly administered. Again, we have heard a great deal, within the last few years, respecting the combinations of workmen in the manufacturing districts; and their disputes with their masters have frequently given rise to proceedings in the courts of law. No one, surely, can imagine that the working-classes have, in such cases, much reason to look with confidence upon the discussions of Grand Juries, who are composed, almost exclusively, of master-manufacturers and their friends, and who must, consequently, feel a strong bias to one side of the question.

When, therefore, we consider the qualifications of Grand Juries, with reference either to their knowledge of law, or to their liability

to be influenced by improper motives, we must equally regard with distrust the jurisdiction which is exercised by these irresponsible tribunals.

But there is another mode in which this institution appears to exercise a prejudicial influence upon the administration of our criminal law: we mean, by the protection which it affords to magistrates who abuse their power, by committing accused persons without sufficient evidence. It appears, from the returns of the committals and convictions, that this is an abuse to which our law is peculiarly liable; nor is it very easy, under the present system, to point out an effectual remedy. The aggrieved party seldom possesses the means of seeking redress in a court of law; and, even if he should, the courts usually refuse to interfere, unless actual corruption, or some grossly improper motive, can be proved against the committing magistrate. The only check which remains is that of public opinion: and even this is often very small, in consequence of the local influence of magistrates; and it is, as we shall see, still further diminished by the effect of Grand Juries in preventing publicity. We will suppose that an innocent man is improperly committed to prison. After he has remained there several months, in the company of common felons, a bill of indictment is laid before the Grand Jury, which is composed, in all probability, of the committing magistrate, and of his friends and acquaintance. The evidence is found to be insufficient; the bill is ignored; and the prisoner is set at liberty: but, at the same time, the matter is hushed up, and the injured party possesses no means of obtaining redress. Even if the presiding judge should have observed the insufficiency of the depositions before the magistrate, he is, from many causes, not very likely to embroil himself unnecessarily with the magistracy of the county, by making unpleasant remarks. But, if justice had been administered without the intervention of a Grand Jury, the prisoner must have been put upon his trial; and the insufficiency of the evidence must have appeared in open court. In that case, the judge could scarcely have avoided remarking upon the misconduct of the magistrate; or, even if he should have neglected so to do, the case would probably be noticed in the newspapers, and be canvassed by the public. It can, therefore, scarcely be denied, that this institution diminishes one of the few securities which we possess for the good conduct of our magistrates.

Having thus shown that Grand Juries, on the one hand, frequently cause the escape of the guilty, by improperly ignoring bills of indictment; whilst, on the other, they tend to encourage improper committals, or, in other words, the punishment of the innocent; it remains that we consider what are the advantages which are derived from this institution; and whether they are of sufficient importance to outweigh the evils which we have enumerated. We

do not recollect to have heard any arguments in favour of the utility of Grand Juries, which may not be reduced under the three following heads: First, that they give additional protection to innocent persons accused, by affording them another chance of escape; secondly, that they save innocent persons from the pain and disgrace of a public trial; thirdly, that they save the time of the court. We shall consider these arguments in their order.

First.—If it be true that innocent persons are saved from unjust condemnation through the instrumentality of Grand Juries, we must conclude that cases sometimes occur, in which the bill of indictment has been properly ignored; but in which, nevertheless, the prisoner would have been convicted, if put upon his trial;—which is certainly a very singular supposition. To suppose that there can be any danger of conviction, when (even on the showing of the accuser himself) there are not sufficient grounds to put the prisoner upon his trial, would be to pronounce a very strong, and, we are convinced, a very undeserved censure upon our courts of justice. It would be to assert, that the proceedings of our courts are so iniquitous, that an accused person is more likely to obtain justice from an irresponsible tribunal, which hears nothing but the statement of his accuser; and even if this charge were as well founded as we are convinced it is unjust, it would surely be much better to reform the constitution of our courts of law, than to attempt to correct one bad institution by the establishment of another almost equally imperfect.

If there be any occasions on which Grand Juries would be likely to have the effect of protecting the innocent against unjust condemnation, it must be in political cases, when the judge is under the influence of the Crown, and when the prisoner is, consequently, not likely to obtain a fair trial. But we have already shown that the political feelings of Grand Juries are usually in favour of the government; so that in such cases they are not very likely to reject the accusation. But even if they were perfectly unprejudiced, the Attorney-General has always the choice of proceeding by *ex officio* information, without submitting the indictment to a Grand Jury at all; and thus the Crown is enabled to dispense with this institution in all those cases in which it might, by possibility, be useful in countervailing its influence.

The second argument in favour of Grand Juries is more deserving of attention; because there can be no doubt that innocent persons, although ultimately acquitted, may nevertheless suffer considerably from anxiety and shame in undergoing a public trial. But it must, at the same time, be recollected that, in many cases, a public trial, so far from being a disadvantage to the innocent, is what he most earnestly desires. Suppose that an innocent man is accused on probable, though not altogether satisfactory, evidence:

under the present system the bill of indictment is ignored, and the prisoner is set at liberty; but, at the same time, it is known that there existed probable evidence of his guilt, there is no proof that he may not have escaped in consequence of a flaw in the indictment; and he goes forth into the world with a blemished character. But if he had been put upon his trial, he would have been heard in his defence, and might have been able to produce evidence which would have explained away all the suspicious circumstances, and would have proved to the world that he could not possibly have been guilty of the crime laid to his charge. Under such circumstances, to be denied a public trial is only an additional hardship.

In considering this argument, we must also recollect, that it is the tendency of the system of Grand Juries to encourage the improper committal of prisoners; and that, consequently, a great part of the persons who are now set at liberty by Grand Juries would never have been committed at all, had that institution never existed. And, surely, the additional pain and disgrace which some innocent persons might experience in undergoing a public trial, would be amply counterbalanced, if a comparatively small number were saved from the suffering of a long imprisonment.

Thirdly.—It is said that the jurisdiction exercised by Grand Juries saves the time of the court. But the force even of this argument, insignificant as it is, will be found to be still less than it appears, if it be true (as we have attempted to shew) that Grand Juries are, in fact, one main cause of many of these improper prosecutions, from which they appear to save the time of the court. The expense of the due administration of justice consumes but an insignificant part of the whole revenues of the state; and it is a payment for which the public receive an ample return. He, indeed, can have paid but little attention to the subject, who does not perceive, that the sum so expended in protecting property and industry, is repaid to the nation a hundred fold in actual wealth, not to mention any other considerations. It would, therefore, be a most short-sighted policy to reject an improvement in our judicial system, because it might be attended with a slight additional expense.

We have thus attempted to prove that it is inexpedient to entrust a *veto* upon the administration of criminal justice to bodies of men so wholly irresponsible as Grand Juries; and we have endeavoured to shew that they are likely to be betrayed into errors, not only by their ignorance of the law, but also by their motives of self or party interest, by which human nature, when uncontrolled, is liable to be influenced. We have seen also that, although this institution may save a few innocent persons from the pain and exposure of a public trial; yet, that this advantage is much more

than counterbalanced by its tendency to protect committing magistrates in the abuse of their power; and thus cause the imprisonment of the innocent. But it may be asked, if this jurisdiction be really so pernicious as it is here represented, how came it to have been ever established. If, however, an institution be proved to be mischievous, the circumstances of its origin are a matter of comparatively trifling importance; nor do we feel ourselves bound to vindicate the wisdom of our ancestors. Yet there may be some satisfaction in learning that the rise of this tribunal may be satisfactorily accounted for, and that its utility might in former times be defended by arguments which have now ceased to be applicable.

Grand Juries appear to have originated in the coroner's inquest. (c) The coroner was, in former times, an officer of much greater importance than at present; and he seems to have exercised a preliminary jurisdiction very similar to that which is now possessed by justices of the peace. He was assisted, as at present, by a jury, whose province it was to consider the sufficiency of the evidence, and whose control over the coroner might, no doubt, be often extremely beneficial in preventing accused persons from being improperly committed to prison. Afterwards, when the jurisdiction of the coroner was narrowed, and when the greater part of his powers were transferred to justices of the peace, it was still considered to be a privilege of accused persons to have the indictment submitted to a jury previously to the trial; and hence appears to have been the origin of Grand Juries. In confirmation of this view of the subject it may be observed, that at present, in those cases in which the accusation has received the sanction of the coroner's inquest, the concurrence of the Grand Jury is not required in order to put the prisoner upon his trial.

It is manifest that Grand Juries form but a very imperfect substitute for the ancient coroner's jury; because they possess no power to control magistrates in improper committals; and, being assembled only at the commencement of the assizes, they can at the utmost save a prisoner only two or three days' imprisonment. Yet it is not surprising that they should have been formerly regarded as an important protection to the innocent. At a time when the judges were removable at the pleasure of the Crown; when petty juries were more easily *packed* and influenced than at present; when counsel were not allowed to assist the prisoner in his defence; and when, in capital cases, he could not even call any witnesses on his behalf; (d) the prisoner would be often more likely to obtain justice from the Grand Jury, than on his subse-

(c) Millar on the English Government, vol. ii, p. 288.

(d) Blackstone's Commentaries, iv p. 358.

quent trial ; since they would hear the whole of the evidence which was afterwards to appear before the petty jury, and would probably be less liable to improper influence. And it would appear that the secrecy of their proceedings, which is now so prejudicial, might at that period be highly useful in protecting them from the vengeance of the Crown or of powerful individuals, whilst, at the same time, there existed no public opinion to which publicity could render them amenable.

It is also worthy of remark, that Grand Juries were formerly in the habit of proceeding as well by *presentment* as by *indictment* ; or, in other words, were accustomed to institute prosecutions of their own accord. They were by this means enabled to institute proceedings against powerful offenders, whom no individual prosecutor could venture to attack ; and the secrecy of their proceedings might, under such circumstances, be highly useful in concealing the proposers of the measure, and in dividing the responsibility equally amongst the whole of the jury. It is scarcely necessary to add that, as the altered circumstances of the country have rendered this power of presentment altogether useless for the administration of justice, it has long ceased to be exercised.

In considering this subject, we have endeavoured to keep the question of the utility of Grand Juries entirely distinct from that of other reforms, which have been proposed in our criminal law. And we have done so, not because we are opposed to those reforms, but because we wish to render the subject as simple and intelligible as possible. It has often been contended that, in the present complicated state of our law, any extensive alterations would be highly dangerous ; because an amendment in one part of the system might be productive of some unexpected evil in another. Without considering the general soundness of this argument, it may be safely asserted that it does not apply in the present instance ; because the alteration proposed is of the simplest kind. We have endeavoured to shew that the mere abolition of the jurisdiction possessed by Grand Juries in criminal cases, even without providing any substitute, would be a decided improvement upon the present system. At the same time we do not mean to assert, that it might not be still more desirable to transfer the power of Grand Juries to some other tribunal, or to make arrangements by which they might be effectually controlled in its exercise. Thus, if, as Mr. Peel has suggested, a responsible public prosecutor were to be appointed in each district, the jurisdiction now possessed by Grand Juries might, perhaps, under some limitations, be entrusted to that officer. Or, if a system more analogous to the present be preferred, it might be enacted, that Grand Juries should assemble at more frequent periods ; that they should in all cases be assisted by a responsible legal adviser ; that their proceedings should be

public; and that all questions should be decided by a simple majority. We have no doubt that regulations of this kind would obviate most of the objections against the present system and would render Grand Juries an institution highly useful in the administration of justice.

ART. III.—THE ROMAN LAW IN THE MIDDLE AGES.

1. *An Inquiry into the Origin of the Laws and Institutions of Modern Europe; particularly those of England.* By George Spence, Esq., of Lincoln's Inn. 8vo. London, 1826.
2. *Geschichte des Römischen Rechts im Mittelalter.* Von F. C. von Savigny. (*History of the Roman Law in the Middle Ages.* By F. C. von Savigny.) 4 vols. 8vo. Heidelberg, 1815, 1816, 1822, 1826.

THE determined hostility with which our "sturdy ancestors" encountered every attempt to establish the civil law in England, forms a singular contrast to that eager admiration, that ardour of enthusiasm, with which the same law was welcomed and adopted throughout the rest of Europe, as soon as a new impulse was given to its study by the University of Bologna. This spirit of resistance on the part of our forefathers has, by the partial fondness of posterity, been ascribed to the most exalted of motives—a just sense, namely, of the rights of subjects, and an attachment to the sacred principles of English liberty. The arbitrary maxims of the Roman law were incompatible, we are told, with the genius of our constitution:—the doctrine, *quod principi placuit legis habet vigorem*, which Professor Christian fancifully terms the *Magna Charta* of the civil law, scandalized a free people, and rendered the system, of which it formed a part, deservedly odious and execrated.

It is an ungrateful task to destroy so flattering an illusion; but we are bound in justice to say, that this is mere idle declamation. The admission of the Pandects into our courts, even to the extent that they were admitted on the continent, could no more have imposed upon the nation the necessity of adopting the *lex regia*, than it would the necessity of assuming the *toga*, or of *lying down* to dinner. That justly branded doctrine was as little connected with the body of the Roman law, as the fish-ponds of Lucullus, or the consular horse of Caligula. It is, indeed, surprising to observe how small a space the public or constitutional maxims of the empire occupy in the volumes of its jurisprudence. They neither form the basis of the *corpus juris*, nor are they, in the slightest

degree, essential to it. Occurring rarely, without coherence or consequence, they have exercised no contagious influence upon the mass; and might be extracted without the risk of injuring its uniformity. "The compilations of Justinian," observes an intelligent writer, "relate almost entirely to the private, and touch very slightly upon the public law of the empire. But, with respect to property, and the rights of private persons, the opinions and decisions of the Roman lawyers do not seem to have been at all perverted by the nature of their government. Perhaps it will be difficult to point out any modern system of law, in which the rules of justice among individuals appear to be so little warped by the interest of the crown, and in which the natural rights of mankind are investigated and enforced with greater impartiality." (a)

We must look elsewhere, therefore, for the grounds of the opposition offered by the English nobility to the introduction of the civil law; and a little reflection will convince us, that a growing jealousy of the clergy was the principal source of so much inveteracy. The clergy had been the most assiduous in propagating the civil law on the continent. In England, also, they were the persons who, from the first, espoused its cause, promoted its study, and sought to establish it in the tribunals. That private views of interest and ambition may have been in the number of their motives we can readily believe. A desire to increase their own importance, by rendering themselves, as the depositaries of all the learning of the age, not merely subsidiary, but necessary, to the administration of justice, was probably a powerful incitement to their exertions. But it is, also, only fair to assume, that the intrinsic excellence of the Roman law, its sound principles, comparatively scientific structure, and the classic associations which it was calculated to awaken in cultivated minds, must of themselves have recommended it to the protection of those who, from their education and habits, were alone capable of appreciating its merits, and whose more refined taste must have revolted against the barbarous usages which, in England, as well as in the rest of Europe, disgraced the name of law.

The barons, on the contrary, rude and unlettered themselves, were satisfied with the rude institutions in which they had been nurtured; which were palpable to their apprehensions, and congenial to their feelings. They were sensible that the introduction of a highly artificial and intricate system of jurisprudence would render them, in a great degree, dependent upon those who were alone qualified to interpret and administer it;—upon persons, whose grasping and encroaching disposition had but too often manifested itself, and whose influence in public affairs had already attained an

(a) Millar's Historical View of the English Government, ii. 331.

alarming height. A well-grounded apprehension may also have been entertained, that the equitable rules of the Roman law would ultimately prove fatal to feudal power and feudal exactions; and hence their earnest efforts to prevent its dissemination. It was at their instance that Stephen issued his ineffectual proclamation, forbidding the study of the civil law; and, if we are to believe John of Salisbury, they burned and tore all books upon the subject that fell into their hands; (b)—a proceeding which at least evinced the zeal, if not the dignity of their opposition.

Notwithstanding this persecution, the doctrines of the Roman law silently made their way into the practice of our courts of justice, and effected a gradual, but most material change in the tone of our jurisprudence. The circumstances of the times were favourable to their progress. The new impulse which society received, in all its members, during the twelfth and thirteenth centuries, the altered and more complicated nature of its relations, and the increasing circulation of wealth, rendered it necessary that the rugged materials, which constituted all that the nation possessed of law, should be moulded into somewhat of form and consistency. In smoothing the asperities, filling up the chasms, and correcting the imperfections of our customary law,—in enlarging, as well as humanizing, our code, it was but natural that those who undertook the task should avail themselves of the only complete and rational system of jurisprudence in being; and the treatises of Bracton and Fleta prove how largely they drew upon the Pandects, not merely for the purpose of deriving a sanction from their authority, but in order to supply deficiencies;—" *ut tum*," says Selden, "*ubi deesset nostri juris præscriptum expressius, ad rationem juris etiam Cæsarei ratione suffultam recurreretur, tum ubi jus utrumque consonum, etiam Cæsarei quasi firmaretur explicareturve res verbis.*" (c) Mr. Spence, indeed, informs us, that the laws relating to contracts had been "preserved by tradition in London and the other trading towns throughout the kingdom;" that Bracton took the pains to set them down in writing; "and so little had they departed from their Roman originals, even after a lapse of many centuries, that he found that they might, with trifling variations, be expressed in the very terms of the Institutes and the Digest of Justinian." p. 540. But why not at once adopt the opinion of Fortescue, (d) that the laws of England are more venerable for their antiquity

(b) "*Alios vidi qui legis libros deputant igni nec scindere verenter, si in manus eorum perveniant jura vel canones.*" De nugis curialium, lib. ii. c. 22. The mention of the canon law, as a joint object of the blind fury of

the laity, confirms our statement, that jealousy of the clergy was the real cause of that resistance.

(c) Dissert. ad Fletam. 3, 4.

(d) De Laudibus Legum, c. 17.

than those of Rome itself? For then it might appear, that the Romans borrowed their law of contracts from us.

If such traditions did exist, is it not strange that every record and trace of them should have escaped the indefatigable Selden? Is it not still more strange that Glanvil, who, nearly a century before Bracton, wrote a treatise expressly upon the laws and *customs* of the realm, should have been altogether ignorant of their existence? We may here observe, that the most minute research has only been able to discover four passages of a date anterior to the reign of Stephen, from which we can infer that the Roman law was even known in England during the dark ages. (e) There is no reason, therefore, to discredit the testimony of Selden. The Roman law, proscribed by the legislature, was countenanced by the tribunals;—judges and practitioners concurred in admitting its corroborative and supplementary force; its ideas and maxims were noiselessly engrafted on the wild stock of our national usages; (f) and the growth, strength, and boasted beauty of the common law are essentially indebted to the writings of the Roman jurists. The expressions of Cowell upon this subject are peculiarly forcible:—“*Postquam aliquot annos in harum scientiarum comparatione posuissem, eadem utriusque fundamenta, easdem rerum definitiones divisionesque, consentaneas plane regulas, similia fere scita, sola idiomatis atque methodi varietate disparata animadverti; et legem nostram communem (quam dicimus) nihil aliud esse quam Romani. et feudalis missionem.*”(g) In the same candid

(e) The first passage occurs in Bede (Eccles. Hist. lib. ii. c. 8.), who states that the laws of Ethelbert were framed *juxta exempla Romanorum*. In a letter of St. Aldelm (Wharton. Anglia Sacra, 2. 6.) of the seventh century, mention is made of the length of time necessary to the study of the *Roman law*. The law of Canute (c. 71.), which prohibits the marriage of a widow within twelve months from the death of her husband, is evidently copied from the Theodosian code (3. 8.). The laws of Hoel Dha (lib. ii. c. 19. s. 70.) also mention the provision of the Roman law which requires two witnesses. Savigny refers, upon the authority of Arthur Duck, to a passage in a manuscript, which was in the possession of Selden; but this was no other than a manuscript of Hoel Dha's laws; and the passage just quoted is

the one alluded to by Duck. In the laws attributed to Henry the First there is a passage copied from the Breviarium; but it is clear, from internal evidence, that this code could not have been compiled before the latter part of Stephen's reign.

(f) “True it is that the common and civil laws had not the same root or stock; yet, by inoculating and grafting, the body and branches do seem, at this day, to be almost of a piece; for the English law has received great alterations, and is very much unlike itself; or (as Mr. Selden expresses it), in regard of its first being, it is like the ship that, by often mending, hath no piece of the first materials.” Wood's Preface to his Institute.

(g) Institutiones Juris Anglicani, Epist. ded. p. 4.

and unprejudiced spirit, Sir William Jones, remarking on the "inestimable pandects," says, "The great work, with all its imperfections, is a most valuable mine of judicial knowledge. It gives law, at this hour, to the greatest part of Europe; and, though few English lawyers dare make such an acknowledgment, it is the true source of nearly all our English laws that are not of a feudal origin." (h) Yet, in defiance of the most conclusive evidence, there are writers who, in the excess of national vanity and self-congratulation, affect to regard the common and civil law as essentially opposed to each other in substance as well as structure; —as possessing no single point of contact or affinity.

Considering the footing which the Roman law gained at so early a period in our ordinary courts of justice, and its still more extended influence and operation when a court of equity was regularly organized, it is difficult to account for the utter neglect into which it has gradually fallen as a study. Professor Millar attributes its decline to the establishment of the Inns of Court, and a growing taste for the common law. Others are of opinion, that here also a terror of the *lex regia* was not without its due share of effect. Doubtless the parliament of Henry the Eighth, which gave to the King's proclamations the force of law, must have been grievously shocked at the doctrine, *Quod principi placuit &c.*; and the no less pestilent proposition, *Principem legibus esse solutum*, must have roused all the virtuous indignation of those patriotic senators, judges, and lawyers, who, during successive reigns, asserted the dispensing power of the Crown.

But whatever may have been the causes of the depreciation of the Roman law in England, the fact is but too apparent. The obligations which our own law owes to it are studiously forgotten, or boldly denied. As a branch of science it is no longer cultivated: it has almost ceased to interest even as matter of history. Lectures, indeed, are still delivered upon it at Cambridge; but the Regius Professorship of Civil Law at Oxford only serves as a melancholy but decent memorial of former studies, and the glory of Vacarius.

Nothing can better illustrate our position, than the cold indifference which the English have betrayed with respect to the recent discovery of the Institutes of Caius. A copy of this work, the acknowledged prototype of Justinian's Institutes, caught the attention of the historian Niebuhr, in the cathedral library at Verona, in 1816. The manuscript is a *codex rescriptus*, and in 62 out of 251 pages, *iterum rescriptus*; that is, the original text of Caius had, during the barbarism of the dark ages, been obliterated, to make way for matter more consonant to monkish taste, which, in its turn, was supplanted by the Epistles of St. Jerome. To

(h) Letter to Lord Cornwallis, Works, vol. iii. p. * 75.

extricate the Roman writer from this accumulated mass of rubbish, was obviously a task of most disheartening difficulty; yet, by the consummate skill and perseverance of professors Göschen and Hollweg, of Berlin, who, upon Niebuhr's report, went to Verona, the work, equally precious to the historian, the scholar, and the jurist, has been restored to the world. The interest which this discovery excited on the continent was as intense as it was general. Two editions have been published at Berlin, besides a translation into German; and it has been reprinted at Paris and at Rome. In England, strange to say, the work is absolutely all but unknown. Slight notices of it have appeared in Dr. Irving's '*Observations on the Civil Law*,' and in Dr. Reddie's rapid sketch of the history of the Roman Law: it has been also cursorily alluded to in a number of the *London Magazine*; a few solitary copies have found their way to the shelves of the learned, and this constitutes the sum of the sensation produced amongst us by a discovery which is regarded throughout the rest of Europe as forming a new era in the history of jurisprudence. Mr. Spence appears to have been entirely ignorant of the existence of such a book; and, as to the body of English lawyers, we may venture to assert, that they know as little of Caius and his writings, as they do of Meshullum, the son of Shephatiah, who dwelt in Jerusalem.

In expressing our respect for the Roman law, and our regret that through prejudice, misapprehension, or national conceit, it should have fallen into disrepute in this country, we are by no means desirous to attach an undue degree of importance to its study, or to challenge for it the same undistinguishing veneration that it enjoyed for centuries on the continent. Still less are we disposed to rescue from oblivion the voluminous labours of the glossators, the vapid prolixity of which was calculated to oppress and nauseate the most eager mind, and to damp the spirit of investigation. Yet, even in these tasteless efforts of misdirected industry, the genius of Savigny has discovered matter not wholly unprofitable; and the long-neglected writings of Accursius and Bartolus, however deserving of the coarsely humorous satire of Rabelais, are still destined, under a skilful hand, to furnish instruction to the world, as marking different epochs in the history of jurisprudence, as well as indicating generally the progress and tendencies of European intellect during the latter part of the middle ages. But, with regard to the Roman law itself, we claim for it only such a degree of attention as it is entitled to from its merits—merits which have been acknowledged by those amongst ourselves, whose extravagant partiality for the common law gives irresistible weight to their testimony. We are told by Burnet (i),

(i) *Life of Sir M. Hale*, p. 11, 12.

that Sir Matthew Hale "set himself much to the study of the Roman law; and, though he liked the way of judicature in England, by juries, much better than that of the civil law, where so much was trusted to the judge, yet he often said, that the true grounds and reasons of law were so well delivered in the digests, that a man could never understand law as a science so well as by seeking it there, and, therefore, lamented much that it was so little studied in England."—Blackstone, also, whose prepossessions are too well known, felt himself constrained to admit "the general excellence of its rules, the usual equity of its decisions, and its use as well as ornament to the scholar, the divine, the statesman, and even the common lawyer." (*k*)

The authority of the Roman law must, it is obvious, henceforth depend, not upon the splendour of its name and pedigree, but upon its real practical utility. That utility has been greatly enhanced by the new and more philosophical method in which it is now studied on the continent;—an improvement to which, it is gratifying to think, a countryman of our own has contributed. We allude to Gibbon, whose brilliant and masterly sketch (*l*) has been translated into German by Hugo, and has served in some degree as a model to the more comprehensive work of that accomplished civilian. Whether the law of England might not, even now, borrow with advantage some of the forms and proceedings of the Roman law, is an inquiry into which we shall not at present enter. But, independently of any such immediate prospect of benefit, a work which presents in one compact body the entire jurisprudence of the greatest nation in the records of the world, must, with all its defects, possess an imperishable interest in the eyes of those who regard law as a science: every step in the development of which has its undoubted value and importance, as tending to accomplish those great objects—the establishment of sound principles of legislation, and the security and happiness of mankind. (*m*) No circumstance, we are persuaded, has contributed

(*k*) Comm. 1. p. 5.

(*l*) Decline and Fall, ch. 44.

(*m*) "The code of Justinian," says Hallam, "stripped of its impure alloy, and of the tedious glosses of its commentators, will form the basis of other systems; and mingling, as we may hope, with the new institutions of philosophical legislators, continue to influence the social relations of mankind long after its direct authority shall have been abrogated." 3. 519. Yet the same author has, but a few sentences before, with

singular inconsistency, expressed an opinion, that "The new legal systems, which the moral and political revolutions of this age have produced and are likely to diffuse, will leave little influence or importance to the Roman law." The editors of the '*Thémis*' have thus commented upon this prediction:—"Ce passage offre un exemple curieux des aberrations auxquelles un bon esprit est exposé, lorsqu'il veut porter un jugement sur des matières qui sont étrangères à ses études."—*Thémis*, 6. 179.

so much to perpetuate the confusion and barbarism of our own legal system, and to render us in law, if not in locality, "*ultimos orbis Britannos*," as the habit of presumptuously disregarding the many informing aids that are to be derived from the history of other times, and the institutions of other countries.

Deeply impressed with these sentiments, and convinced that, without a spirit of extended and philosophical inquiry in the professors of the law, little will ever be effectually done towards the amendment of our code, we naturally look with warm interest upon any work that manifests such a disposition; and, in this point of view, Mr. Spence's book is entitled to our especial regard. We have also a strong additional motive to notice it, in the opportunity which it affords us of introducing to the attention of our readers Savigny's '*History of the Roman Law in the Middle Ages*;' a production which deservedly enjoys the highest degree of reputation on the continent, but of which little more is known in England than the name. The two works, to a certain point, travel over the same ground—a wide and varied field of investigation, comprehending the colonial policy of the Romans, the civil and military administration of the provinces, the municipal institutions of the towns, and the general condition of the inhabitants under the Emperors, the dissolution of the western empire, the laws and institutions of the different tribes of barbarians that established kingdoms on its ruins, and the momentous changes effected in the political and social state of Europe by that violent and wide-spreading revolution.

It would, however, be an invidious task to institute a close comparison between Mr. Spence's imperfect '*Inquiry*,'—the *σαφές* of "*a practising Chancery Barrister*;"—and the full, elaborate, and highly-finished performance of the German professor. The former is evidently a hurried essay, composed from scanty materials, loose and disjointed in its formation, without unity or regularity of design, and with little pretension to that polish which the *multa dies et multa litura* of Horace are calculated to produce. At the same time, there are parts of it executed with considerable power and effect. The abstract of the civil law is the author's most successful effort: it wants the spirit of Gibbon's admirable delineation; but its general accuracy and perspicuity merit our warm applause. The laws of the barbarians are not given with the same fidelity; partly, no doubt, from the author's limited sources of information; for Lindenbrog, though in most points an useful and trust-worthy guide, is not all-sufficient; partly, we are constrained to say, from carelessness and precipitation. The following passage may serve as a specimen of the latter:—"The law of Theodoric," observes Mr. Spence (p. 381), "prohibiting parents from selling their children, was made rather

to guard against the introduction of a Roman custom amongst his barbarian subjects, than to take from them a power they already enjoyed."—Now, in the first place, it is to be remarked, that the law in question *does not prohibit* parents from selling their children, but merely declares that such a bargain shall not prejudice the child's inherent *right of freedom*. But what is still more singular is, that this part of the edict of Theodoric, which, we are informed, was "*to guard against the introduction of a Roman custom*," is actually copied, almost word for word, from the '*Receptæ Sententiæ*' of the Roman jurist, Paulus, (n) a treatise not utterly inaccessible to Mr. Spence, as it is to be found at the end of every '*Corpus Juris*.'

The author's description of the political and judicial administration of the Roman provinces is generally correct: some errors we shall have occasion to point out hereafter; the main defect, however, is a want of lucid arrangement. But the account of the condition and institutions of the German invaders is not only confused in itself, but it abounds with the most glaring inaccuracies.

In this portion of the work, Mr. Spence has religiously embalmed all the exploded errors of former writers. Thus it is that he persists in confounding the *scabini*, *sachibarones*, and *rachimburgii*, three classes which, if we would understand rightly the judicial organization of the barbarians, it is essential that we should keep wholly distinct. With the same veneration for the mistakes of his predecessors, he separates the functions of the *count* and *grave* (*comes* and *grafio*), although it is clear from the very authorities (o) cited by himself, that these are merely two names, the Roman and the German, for one and the same dignity. These defects are the less excusable, because a reference to

(n) *Julii Pauli Rec. Sent.* 5. 1. 1. "Qui contemplatione extreme necessitatis, aut alimentorum gratia, filios suos vendiderint, *statui ingenuitatis eorum non prejudicant. Homo enim liber nullo pretio aestimatur.*" The passage in the edict of Theodoric stands thus:—"Parentes qui cogente necessitate filios suos alimentorum gratia vendiderint, *ingenuitati eorum non prejudicant; homo enim liber pretio nullo aestimatur.*"—Edict. Theod. c. 94. The Constitution of the Emperor Constantine, Cod. 4. 43. 2. explains more fully the consequences of such a transaction; by which it appears that the purchaser acquired a right to the services of the child; but

the civil condition of the latter was not thereby prejudiced; and he could recover his liberty either by repaying the purchase-money, or procuring a slave of the same value as a substitute.

(o) The *Lex Ripuariorum*, tit. 83, is referred to by the author (p. 307), for the purpose of proving that the *grave* was something different from the *count*. The law runs in these words:—"Si quis judicem *fiscalem*, quem *comitem* vocant, interfecerit, 500 solidis mulctetur." But what is the title of the law? "De eo, qui *grafionem* interfecerit!" At this very day *graf* is the German for *count*.

Meyer, (o) whose admirable treatise the author quotes more than once, would have rectified all misconception upon the subject. A little more faith in Meyer would also have prevented Mr. Spence from stating, *in the teeth of all his own authorities*, that the fine paid as a satisfaction for private enmity among the barbarians, "when it is noticed in the codes, is called the *faida*," (p. 428), and thus falling into as gross an error as that with which he justly charges Montesquieu and others, the error, namely, of confounding the *faida* with the *fredum*. The term *faide* invariably means the *feud* or *animosity* itself, and no more.

"Transporter dans des siècles reculés toutes les idées du siècle où l'on vit, c'est des sources de l'erreur celle qui est la plus féconde." Mr. Spence is not always free from the influence of this illusion; he cannot banish from his mind the associations of the passing moment; and even without the information conveyed in his preface, we should have been tempted to pronounce his description of the extraordinary jurisdiction of the pro-consul (p. 178) to have been written by a chancery barrister. Another source of error is a disposition to encourage certain fanciful prepossessions, which warp his judgment, and cause the simplest and most obvious truths to pass unheeded. For example:—he is resolved to see, in the condition of the Roman cultivators of the soil, the origin of predial servitude and tenure in villenage. In p. 33, therefore, he renders the Roman term *villici*, *villeins*; and thus ingeniously prepares his readers for the assertion in p. 538, that it is "highly probable that the *ceorls* and *liti* were a race whose stock is to be traced to the ancient *coloni* of the provinces;"—forgetting, unhappily, that Tacitus, in the most explicit language, describes this species of bondage as prevailing among the Germans when the Romans first became acquainted with them. (q) Another instance of that intellectual blindness which so often accompanies the passionate pursuit of a favorite opinion, occurs at p. 519. Mr. Spence, in his anxiety to prove that, in the deliberative assemblies of the Anglo-Saxons, the king and nobles alone decided upon the measures proposed although the people attended these councils, quotes the following passage from the Saxon Chronicle, as evidence "that the measures considered by the *proceres* or *witan* to be for the public good, were sometimes passed into a law, and enforced by the king, even

(p) *Esprit, origine et progrès des Institutions judiciaires*, t. i.

(q) "*Ceteris servis, non in nostrum morem descriptis per familiam ministeriis utuntur. Suam quisque sedem, suos penates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono injungit: ut servus hactenus*

paret." De Mor. Germ. c. 25. In the same chapter Tacitus mentions *Freedmen* among the Germans:—" *Liberti non multum supra servos sunt,*" a passage which appears also to have escaped the memory of Mr. Spence.

though contrary to the known wishes of the people at large : " Cæpit deinde rex frequenter quærere ex suis optimatibus quid eorum singulis factu optimum esset visum, quo huic terræ prospiceretur priusquam penitus devastaretur. Decretum est igitur a rege ejusque optimatibus *in universæ gentis utilitatem*, quanquam omnes id inviti facerent, necessarium esse ut iis (Danicis) tributa persolvantur." Our author adds that it is probable "that the council was held in the presence of the whole body of the people assembled as an army." Strange to say, however, there is not one word, from beginning to end, concerning the attendance of the people. The king consults the nobles, and it is determined, *for the good of the public weal*, that the tribute shall be paid, *quamquam omnes id inviti facerent*, although the whole council, king as well as nobles, adopted this resolution with reluctance. Powerful indeed must have been the illusion under which Mr. Spence laboured, when he could think of referring *id inviti facerent* to the people at large.

In noticing these misconceptions, and others to which it will be necessary to advert in the progress of our article, (r) we are far from harbouring any unkindly feeling towards the author, or from wishing to discourage him in a course of study so creditable to his taste. We are rather disposed, indeed, to regard the work, as the author himself probably regards it, in the light of a sketch, which he purposes to fill up hereafter, when greater leisure, and a more extensive range of reading will have enabled him to penetrate the shadows of the dark period which he has selected for his investigations. But even in its present unfinished state it is extremely valuable, as an indication of the prevalence of more enlarged views, and more enlightened feelings among the class to which the author belongs, and as an earnest of future exertions. The nine years' legitimate probation, the "*limæ labor et mora*," may well be spared for the sake of so enlivening a prospect.

The work of Savigny is of a far higher order, and more positive value. It is one of those uncommon productions which give to the annals of past events a new character and colour. By

(r) In the minor details of the work there are manifold signs of haste, and want of revision. Thus (p. 92), the splendid eulogy upon the laws of the twelve tables; "*fons omnis publici privatique juris*," from Livy, is attributed to Cicero. Again, in p. 308, the reader must no doubt be surprised to find a respectable Gothic magistrate with so meretricious a title as *Lais*; the real name, however, is

Naio. In p. 167, the law term "*essoigne*," is derived from the *monbus sonticus* of the pandects ("*sontica causa*." Tibull. 1, 8, 51); but by the time the author arrives at p. 464, he becomes oblivious, "*magnus dormitat Homerus*," and the same term is deduced from the word *sunnis* in the barbarian codes. Many other flaws of a similar description might be pointed out.

unequalled assiduity in collecting together scattered and isolated facts and documents from all quarters, by a nice perception of faintly-traced but necessary relations, and by a rare power of arrangement and combination, Savigny has succeeded in diffusing light and animation over a period the most gloomy and torpid in the history of the middle ages. The depth of research, the vigour and accuracy of criticism, and the extent of varied erudition displayed in this work, are beyond all praise;—nor must we omit the nervous simplicity of its style, which possesses peculiar attractions for foreigners, who not unfrequently find it difficult to thread the mazes,—clause within clause, and parenthesis within parenthesis,—of interminable German sentences. If, in some few instances, the author may appear to have been seduced by the bold and independent tone of his mind into an error, the reverse of that vacillating indecision with which he justly charges Muratori, and to have arrived too rapidly at certainty; yet the reader is never called upon to pay a blind deference to his opinions. The grounds of those opinions are scrupulously stated, and none need assent to them but through conviction.

The author has divided his history into two parts; the first embracing the six centuries from the dissolution of the western empire to the time of Irnerius; the second, the remaining four centuries of the middle ages. Until within a recent period, a "History of the Roman Law during the Dark Ages," would have been regarded by the generality of readers as the history of a "*chateau en Espagne*,"—something altogether unsubstantial, the idle imagination of some dreamer. The prevalent belief was that the Roman law was crushed with the Roman empire in the west;—that it remained buried and forgotten during six hundred years of barbarism, until by a happy accident a copy of the pandects was discovered at Amalfi, in 1135, when that city was taken by the Pisans. This story has, from the time of Sigonius, been religiously repeated by historian after historian, and lawyer after lawyer, so that the ideas of the pandects, Amalfi, and the Pisans, are as inseparably associated in our minds, as those of Romulus and his wet-nurse, the she-wolf, or of Arthur and the round table. True it is, that some of the number of those who, to use Locke's expression, "are not content to live lazily on scraps of begged opinions," ventured to question the truth of the above tale. That the Roman law should have remained in a state of inanition for six centuries, and should then, merely from the fortuitous discovery of an old manuscript, have burst forth into new life and action, seemed to savour too much of the marvellous. Upon an examination of the subject, various records of the existence and operation of that law at different periods of the dark ages were brought to light, and it was found that Irnerius had lectured as well upon the

pandects, as the other compilations of Justinian, in the University of Bologna, many years before the taking of Amalfi. These circumstances naturally tended to throw some discredit upon the whole of the story; and in 1722, Donato Antonio D'Asti, in a work entitled "*Dell' uso ed autorità della ragion civile nelle Provincie dell' Impero Occidentale*," dared openly to dispute the fact of the boasted discovery of the Pisans; in which opinion he was seconded by Professor Grandi, of the University of Pisa, and others. This led to a long controversy. Muratori, with characteristic timidity, hesitates to decide the question. Tiraboschi professes his reluctance to join the enemies of the received opinion, but very naively expresses a wish that it rested on some more solid foundation (ma, a dir il vero, sarebbe a bramare che ella avesse fondamenti più certi di quelli che finora si sono addotti). The authorities in favour of the story are not, indeed, of the most convincing nature. Among the numerous early historians who describe the capture of Amalfi,—among the host of Pisan chroniclers, there is not one who mentions the discovery of the pandects. There is, however, in support of the statement, an anonymous chronicle of the *fourteenth century*, written consequently two hundred years after the supposed event; and there are the following elegant lines from what Muratori denominates the "tenebrose poem" of Raniero de Granci, written about the year 1340:—

Malfia Parthenopes datur et quando omne per æquor,
Unde fuit liber Pisanis gestus ab illis
Juris, et est Pisis Pandecta Cæsaris alti.

Our readers are perhaps aware, that the veridical historian William of Malmesbury relates that St. Philip sent over to Britain twelve of his disciples, under the conduct of his dear friend Joseph of Arimathea, to convert the Britons. (s) The account is confirmed by the testimony of a poet by no means tenebrose:—

Yet true it is that long before that day
Hither came Joseph of Arimathy,
Who brought with him the holy grayle, they say,
And preach't the truth; but since it greatly did decay. (t)

We are bound, then, in candour to declare, that those who believe in the conversion of our ancestors by Joseph of Arimathea,

(s) "*Volens igitur (Sanctus Philippus) verbum Christi dilatari, duodecim ex suis discipulis elegit, ad prædicandum incarnationem Jesu Christi—et ad evangelizandum verbum vitæ misit in Britanniam; quibus, ut ferunt, carissimum amicum suum Joseph ab Arimathia, qui et Domi-*

num sepellivit, præfecit." Gulielmus Malmsb. de Antiqu. Glaston, ecclesiæ. This modest narrative was somewhat embellished by the monks of Glastonbury, as any of our readers will find, who will consult Stillingfleet's *Origines*.—Brit. p. 13.

(t) *Færie Queen*, 2, 10, 53.

may with a safe conscience credit the discovery of the pandects at Amalfi. But the truth or falsehood of this part of the story necessarily ceased to be of importance, as soon as it was satisfactorily proved, that other copies of the pandects had existed, and that, long before the 12th century, the Roman law had been in use in the kingdoms which supplanted the western empire.

To what extent it prevailed, or what degree of influence and authority it possessed; whether it had a legitimate political existence, or was merely tolerated and connived at in the transactions of private individuals, were questions which still remained involved in much doubt. It was reserved for Savigny to elucidate this interesting portion of history: the task he has accomplished in his first two volumes; in which he has traced the course of the Roman law in one uninterrupted stream from the fifth century down to the twelfth. We shall endeavour, in a concise account of the events of the period, to embrace the most important results of Savigny's invaluable labours.

The author observes, in his prefatory remarks, that every former inquiry into the subject has been conducted as if the Roman law were something isolated and self-subsisting, altogether independent of the condition, or even the existence of the Roman people. But it is manifest, that if the Roman people were utterly exterminated upon the subversion of the western empire, the continuance of the Roman law must not only have been superfluous, but absolutely impossible. The same impossibility would exist, if the Roman subject were deprived of his personal freedom, or the entire of his property; for in that case there would be nothing upon which the law could operate. Nay, though the vanquished should have retained some portion of their individual freedom and property, yet if their political existence were annihilated, and they themselves completely incorporated with the victors, it is difficult to conceive how the Roman law could survive. The author has, therefore, prepared the way for the history of the law itself, by investigating the condition of the Roman inhabitants in the newly established kingdoms, and the political and judicial institutions under which they lived. But in order to obtain a clear and comprehensive view of those institutions, it is necessary that we should have some insight into the state of the administration of the provinces, previous to the irruption of the northern invaders.

The cities of Italy retained under the empire some faint traces of their former independence. Though subject to the Roman state, in their internal administration they were, to a certain degree, free and uncontrolled. Each city had its own senate, and its own magistrates. The senate was designated *Ordo Decurionum*, or *Ordo*, and subsequently *Curia*; and its members *Decuriones*, or *Curiales*. The decurions elected the magistrates from

among their own body; they alone, consequently, possessed the complete privileges of a citizen, *suffragium et honores*, corresponding with the *cives optimo jure* of the republic. But, under the increasing rigour of despotism, obscurity became the only safeguard against oppression. The rank of decurion, which had been eagerly courted as an honourable distinction, was now shunned as an intolerable burthen. Many sought refuge in the military service; some in bondage itself; all dreaded an elevation which must necessarily expose them to the tyranny and extortion of provincial governors,—the only remnant of the republic. The constitutions of the Theodosian code are at once an evidence of the deplorable degradation of the order of decurions, and the deep decay of the whole body politic under the christian emperors. (u)

The chief magistrate of the Italian cities, and of those cities in provinces upon which the *jus Italicum* had been conferred, were the *duumviri*. (v) These magistrates presided in the senate, and superintended all branches of the municipal administration: They possessed jurisdiction in civil matters (*jurisdictio contentiosa et voluntaria*). The extent of their active jurisdiction (*jurisdictio contentiosa*) was restricted by the emperors to causes of a certain amount; and from their decisions there was an appeal to the governor of the district. The office of duumvir was annual; the burthensome nature of its duties and liabilities may be conjectured, from a constitution of Constantine, which condemns those, who should abscond in order to evade their election, to serve the office for two years instead of one. (w) The sole difference between the prefectures and the other towns of Italy, consisted in the substitution of a *præfectus juri dicundo* for the *duumviri*. This officer was not elected by the municipality, but was dispatched every year from Rome.

(u) What can more forcibly express the deplorable wretchedness of the provincials, and the grinding oppression under which they suffered, than the remark of Salvian, that captivity among the barbarians was more enviable than liberty among the Romans? "Malunt enim sub specie captivitatis vivere liberi, quam sub specie libertatis esse captivi."

(v) In some few cities four magistrates were elected; in which cases they were styled *quatuorviri J. D.* (*juri dicundo*).

(w) "Qui ad magistratum nominati aufugerint, requirantur; et si pertinaci animo latere patuerint, his ipsorum bona permittantur, qui presenti

tempore in locum eorum ad Duumviratus munera vocabuntur; ita ut si postea reperti fuerint, biennio integro onera Duumviratus cogantur agnoscere: omnes enim, qui obsequia publicorum munerum declinare temptaverint, simili condicione teneri oportet." Cod. Theod. 12, 1, 10. Mr. Spence has mistaken what was thus intended to be a grievous penalty for a regular election; he has also confounded the *quinquennalis duumvir*, or censor, with the *duumvir J. D.* Under this double mistake he has stated that the Duumviri were chosen "in some cities once a year, in others every two years." p. 10.

Another municipal magistrate was the *quinquennalis duumvir* or *quatuorvir*, in some towns styled *censor* or *curator*. His functions nearly corresponded with those of the censor at Rome. The election of the *quinquennales* took place once in five years; but the office was held for only a year, (x) and, like the censorship at Rome, (y) remained vacant during the residue of the period.

In the provinces there were no elective magistrates. The affairs of each municipality were administered by the decurion, whose name stood first on the *album*; who was styled *principalis*, presided in the senate, and, after filling the office for fifteen years, was succeeded by the next in rotation on the *album*. His functions were executive, not judicial; all jurisdiction being vested in the hands of the governor of the province. But the regular establishment of defensors (*defensores civitatis, plebis, loci*,) produced a complete change in the administration of the provincial cities. Defensors were originally patrons chosen by plebeians, to protect them from the oppression of the imperial governors. About the year 365 they appear in the character of public officers: subsequently they acquired a limited jurisdiction, and the right of presiding in the senate. They were elected by the whole body of the city, and held the office for five years. Until the time of Justinian no decurion was eligible to the post of defensor.

Upon the separation of the military from the civil authority by Constantine, the supreme civil power in the provinces was exercised by a governor (*rector, judex, judex ordinarius*), who, according to the extent of his province, was denominated *consularis, corrector*, or *præses*. The military power was entrusted to generals called *duces*, or *comites*, subject to the control of the *magistri militum*.

Judicial proceedings were conducted in the Italian cities and in the provinces according to the same rules as at Rome. During the republic the regular course was this:—The magistrate having examined what the law was, applicable to the individual case presented to him, pronounced a conditional sentence. He then nominated a private person (*judex*), whose business it was, to ascertain the fact, to apply the law of the magistrate, and to pronounce definitive judgment. This method of proceeding was denominated *ordo judiciorum privatorum*; all causes decided by the magistrate without the intervention of a *judex* were consequently *extra ordinem* (*extraordinariæ cognitiones*). Under the empire, the extraordinary branch of jurisdiction gradually ex-

(x) This appears from an old inscription: "Anno Quinquennialitatis Petinii Prisci." Gruter .p. 322, n. 8.

(y) By a law of the dictator Ma-

mercus Æmilius, the power of the Roman censors was limited in duration to eighteen months. Liv. 4, 24, and 9, 33.

tended itself, until, in the time of Justinian, the *ordo judiciorum* became entirely extinct. In order, therefore, to supply the want of the old constitutional *judex*, and thus to expedite the administration of justice, the emperors were obliged to establish a species of collegiate body (*consistorium, auditorium*), to assist them in their judicial functions. Their example was followed by the governors of the provinces, and by the municipal magistrates; and as the latter naturally looked to their ordinary colleagues, the decurions, to be their assessors, the *curia*, by imperceptible steps, became a court of justice.

The jurisprudence of Rome at the beginning of the fifth century consisted of the following materials:—the laws of the twelve tables, the *plebiscita*, the *senatus consulta*, the prætorian edicts, the imperial constitutions, and the unwritten customs. Such were nominally the authorities of the Roman law; but their appalling bulk and frequent incongruities, rendered the greater part of them practically unavailable. The judge consulted the writings of the jurists and the imperial constitutions alone. Yet even thus he was not relieved from perplexity. The treatises of the jurists multiplied with a prolific rapidity the most embarrassing; a cloud of commentaries darkened the face of the law; and where information was sought, nothing was found but contradiction and confusion. The same difficulty attended a reference to the ill-assorted and continually increasing mass of imperial constitutions. To remedy the first of these evils, Valentinian the Third issued his famous constitution, selecting from the multitude of commentators the following five writers, as the future guides in the administration of justice:—Papinian, Paulus, Caius, Ulpian, and Modestinus. The whole of the works of these distinguished jurists, with the exception of the notes of Ulpian and Paulus upon Papinian, were endowed with the force of law; and in the event of a difference of opinion, the majority was to prevail, a preponderance being given to the opinion of Papinian wherever the numbers should be equal. The collections of the imperial rescripts by Gregorian and Hermogenian in some measure facilitated the use of the constitutions; but this object was more completely attained by the compilation of the Theodosian code, A. D. 438, in which all the public edicts of the emperors from the time of Constantine were brought together.

At the dissolution, therefore, of the western empire, the sources of Roman law consisted of, 1. The writings of the five select jurists;—2. The collection of rescripts by Gregorian and Hermogenian;—3. The Theodosian code;—and 4. The novels, or constitutions issued subsequently to the time of Theodosius the Younger.

Having thus cast a transient glance at the condition of the Romans at the period immediately preceding the extinction of the em-

pire in the west, we must next direct our attention to the national institutions of those northern invaders, who consummated the work of destruction, and established their several kingdoms on the ruins of Rome's greatness. These institutions were of the simplest and most inartificial character, furnishing, in spirit as well as form, a striking contrast to the complicated relations of Roman society. The freemen constituted the nation; from them emanated all political power, all public rights and immunities. The territory of the state was divided into districts; and this division formed the basis of the political and judicial organization among the Germans. At the head of each district was a count (*comes*, or *gräfo*), who led the freemen forth to battle in their national wars, and who presided in the tribunals. But although he presided in the court, he possessed no voice in the administration of justice; it rested with the freemen alone to determine the fact and the law in each particular case, and to pronounce the sentence. This duty was originally performed by the whole body of freemen within the district, or by those among them who were specially summoned for the purpose; but, at the time of Charlemagne, a distinct order of assessors was established under the name of *scabini*, whose duty it was to attend the court regularly; not, however, to the exclusion of the freemen at large. The latter still possessed the *right* of assisting in the administration of justice;—the *obligation* of so doing was transferred to the *scabini*.

Among the Lombards, the name by which freemen were distinguished, as well from slaves or vassals as from persons in authority, was *arimanni* (*erimanni*, *eremanni*, *haremanni*, *herimanni*, *herman*, *germani*). In some ancient documents the name denotes freemen acting in the capacity of assessors; in some, the freemen of cities; and in this latter sense it was, in the eleventh and twelfth centuries, applied indiscriminately to all free citizens, whether of Lombard or of Roman extraction. The collective body of the *arimanni* of a district or town was denominated *arimannia*: but this term not unfrequently signifies the property of an Ariman, or free property, corresponding with the expression *dominium ex jure quiritium* of the Romans: it denotes, moreover, the contributions paid by the freemen for the public service. By accurately discriminating these various modifications of one and the same idea, Savigny has succeeded in dispelling all the doubt and obscurity in which the term *arimanni* had been involved by the misapprehensions and conflicting hypotheses of Du Cange, Muratori, Sismondi, and other writers.

Corresponding with the *arimanni* of the Lombards, were the *rachimburgii* of the Franks; who were also designated by the equivalent expression *boni homines*. That the *rachimburgii* were not the same as the *scabini*, or select assessors, as those writers

assert, whose steps Mr. Spence has followed, is proved by Savigny to demonstration. Among the Saxons, freemen were called *fri-lingi*;—among the Anglo-Saxons, *freoman*; and, when associated in tithings, *friborgi*. All these idiomatic appellations will be found, when analyzed, to contain the same fundamental idea, that, namely, of complete civil liberty, with all its rights and immunities; (α) and, without laying any particular stress upon etymological coincidence, it is curious to observe that this idea also prevails in the national appellatives, *Goths* (good men, *boni homines*), *Franks* (freemen, *liberi homines*), *Alemans*, and *Germans* (*arimanni*).

The *scabini* were, as we have before remarked, a distinct order of assessors, instituted by Charlemagne: they were elected by the people, under the direction of the *missus regius* and the count. The origin of their institution is thus explained by Savigny. By the early German constitution, all the freemen of a district were bound to attend the general assembly, which was held under the count, or his deputy, three times in the year. But courts were also held in the intervals between these general assemblies. Seven assessors, with the count, formed a court; and every freeman was liable to be summoned, at the discretion of the count, to act as assessors on these occasions. This naturally led to abuse. The freemen were harassed by being summoned either more frequently, or in greater numbers, than was necessary, merely for the sake of the fine due for non-attendance. To put an end to this species of extortion, the *scabini* were appointed; and thenceforward the other freemen were relieved from the obligation of attendance, except at the three great assemblies. The judicial functions of the *scabini* varied in no respect from those of their predecessors. It was within their province to determine the law as well as the fact; and, in this particular, we beg to inform Mr. Spence, that they differed essentially from the *judices* of the Romans, who, as we have observed above, received the law from the prætor, or magistrate. It is not a little singular, that in this most important point of jurisdiction, the modern English jury bears a closer resemblance to the Roman *judices* than to the German *scabini*.

The supreme magistrate of each district, who led the freemen in the field, and presided in the tribunals, we have hitherto, for the sake of brevity, designated by the name of count, although the title varied in the different German kingdoms. Among the Franks

(α) The *prud' hommes* of the French, the *goede mannen* of the Dutch, the *ricos hombres* of the Spaniards (in which expression *rico* does not signify rich, but good), the *probi*

et *legales homines* of our own law language, and the *good men and true* of our ballads, serve at this day to remind us of the universality of this idea.

and the Bavarians (*a*) this officer was called *grafio*, or *comes*;—the former being the native German title, the latter its Roman equivalent. Savigny is, however, of opinion, that the two names were not employed indiscriminately, but always with reference either to the birth of the person appointed to the office, or to the preponderance of Roman or German inhabitants in the district subject to his authority; so that it is not impossible that one or the other title may, from the latter cause, have become inseparably attached to particular districts. We are bound to remark here, that Mr. Spence's observations (p. 307) upon the office of *greve*, or *grave*, the *grafio* of the Franks, are, throughout, one tissue of misconception.

The *eorl* (*b*) of the Anglo-Saxons enjoyed the same rank and authority as the *grave* of the Franks and Bavarians; he also was styled *comes*. The title *greve* (*gerefa*), among the Anglo-Saxons, had a far more large and indeterminate acceptation than the Frankish *grafio*: it signified, generally, any person possessing authority; and was usually associated with some other word, indicating the limits of that authority, as *portgreve*, *hundredgreve*, *shiregreve*. (*c*)

Little doubt can exist that, among the other German tribes also, the supreme officer of the district was distinguished by some indigenous title, although the universal adoption of Roman names has rendered these national peculiarities undiscernible. In the kingdom of the Lombards, the local magistrate was denominated *judex*, or *comes*; but, from the time of the conquest of the Lombards by the Frankish monarchs, *comes* became the permanent title. That the name *grave* was not recognized by the Lombards is manifest from the passage which we have already quoted from their historian Paulus Diaconus, who notices this designation as peculiar to the Bavarians. Among the Burgundians, the title *comes* prevailed in the same sense as in the other German states, and was applied indiscriminately to all who were invested with the office, whether they were of Roman or of Burgundian descent. This appears from the prologue to their code, which is subscribed by thirty-two *comites*:—"Sciant itaque tam Burgundiones

(*a*) "Hic cum comite Bajoariorum, quem illi *gravionem* dicunt,—confluit." Paulus Diaconus. Hist. Longob. lib. 3, c. 36.

(*b*) Spelman asserts that *eorl* was a Danish title, equivalent to the *cal-dorman* of the Anglo-Saxons. Gloss. voc. Eorl.

(*c*) "Greve quoque nomen est

potestatis, Latinorum lingua nihil expressius sonat quam *præfectura*, quoniam hoc vocabulum adeo multipliciter distenditur quod de scyra, de wapentachiis, de hundredis, de burgis, etiam de villis *greve* dicitur. In quo idem sonare videtur, et significare quod *Dominus*." Ll. Edo-vardi, 35.

quam Romani civitatum aut pagorum Comites." The Ostrogoths and the Visigoths, also, adopted the same title.

In all the German kingdoms the duke, *dux*, *herzog* (the *heretoch* of the Anglo-Saxons), exercised only military authority. Originally, the appointment was temporary, and lasted no longer than the war; but subsequently it became, in some states, a permanent dignity, superior to that of the count, but without jurisdiction. Sometimes the two offices were combined; and this will serve to explain those passages in which jurisdiction is attributed to a duke. The dukes of the Bavarians and the Alemans, as well as those of Beneventum and Spoleto, were dependent princes, and are not to be classed with these military commanders. The *tunginus*, or *centenarius*, the *advocatus* and *vicecomes* of the Franks; the *decanus*, *centenarius* and *vicecomes* of the Anglo-Saxons, and the *sculdascii* and *decani* of the Lombards, were all subordinate officers of the district, elected by the people, and exercising a limited share of jurisdiction.

With respect to the *sachibarones*, or *sagibarones*, it is impossible, from the scanty information that has been handed down to us, to pronounce confidently upon the nature of their official duties. One thing, however, is most certain,—that they were *not* assessors to the count, or *scabini*, as Mr. Spence, misled by the authority of great names, erroneously describes them (p. 440, and elsewhere). It appears, from the Salic law, the only code in which they are mentioned, that they had a concurrent jurisdiction with the count, or *grafio* (L. Sal. t. 56, 4.);—that the composition for the murder of a *sagibaro*, if free-born (*ingenuus*), was the same as for the murder of a count (t. 56, 3.); but if he had been a king's slave (*si puer regis fuerat*), his composition was only the half of the count's (t. 56, 2.). Mr. Spence has made a strange *olla podrida* of the dispositions of this title of the Salic law. According to the conjecture of Savigny, the *sagibarones* were officers appointed by the king, to counterbalance the authority of the counts at that early period, when the latter were elected by the whole body of the people. As soon, however, as the king had usurped or acquired the power of nominating the counts, the *sagibarones* necessarily disappeared; and this will account for the circumstance, that though they occur in the Salic law, no mention is made of them in the later compilation of the Riparian code.

Among the numerous peculiarities which mark the civil administration of the European states during the dark ages, none, perhaps, is more striking, or more repugnant to our conceptions of the essential qualities of law, and the rational principles of government, than the system of personal law, which prevailed everywhere, except in the short-lived kingdom of the Ostrogoths. Legal confusion carries with it, indeed, nothing absolutely startling to us.

From the experience of our own country, without referring to the *pays coutumiers* of France before the revolution, we can readily imagine the existence of a multitude of local usages at utter variance with the general code of the state. We can also conceive that a conquered province, although politically incorporated with the empire of the conquerors, may be permitted to retain its laws and customs inviolate. But, in these and all other cases, we inevitably associate the idea of law with that of some definite territory, within the limits of which it is to have operation and effect; and we can with difficulty picture to our minds a law, attached not to place but to persons,—a moveable chattel, a piece of household furniture, which each individual shall be at liberty to transport with him from place to place, in every capricious change of his abode. Such, however, was the law of the dark ages. The Lombard, the Goth, the Frank, the Burgundian, the Saxon, and the Roman, residing in the same district, all enjoyed their separate laws. (d). “It constantly happens,” says Archbishop Agobard in a letter to Louis le Debonaire, “that of five persons, who are walking or sitting together, not one is subject to the same law as the other.” (e) So independent, indeed, was law of locality, that the code of the Ripuarian Franks was augmented in the reign of Charlemagne, long after they had ceased to exist as a nation.

Some modern authors have gone so far as to maintain, that every member of society had the right of choosing by what law he would be governed. “Chacun pouvoit prendre la loi qu’il vouloit,” observes Montesquieu. (f). Muratori asserts the same with respect to Italy:—“Fu permesso agl’ Italiani di seguir la Legge, che più lor gradiva.” (g) Hallam and others have adopted the same opinion. But this notion is most successfully refuted by Savigny, who traces the error to its true source. Monstrous as the system of personal law was, it could not be taxed with so glaring an absurdity. The law of each individual was determined by certain fixed rules. Generally speaking, he inherited the law of the nation from which he was descended by the father’s side; but to this regulation there were exceptions. A married woman had the privilege of assuming the law of her husband;—if she became a widow,

(d) One authority out of a multitude may serve as an example;—“Hoc autem constituimus, ut infra pagum Riparium, tam Franci, Burgundiones, Alamanni, seu de quacunque natione commoratus fuerit, in iudicio interpellatus, sicut lex loci continet ubi natus fuerit, sic respondeat. Quod si damnatus fuerit, secundum legem propriam, non secun-

dum Riparium, damnum sustinet.” *Lex Ripariorum*, t. xxxi. c. 3, 4.

(e) “Nam plerumque contigit ut simul eant aut sedeant quinque homines, et nullus eorum communem legem cum altero habeat.” Agobardi *Ep. ap. Bouquet. tom. vi. p. 356.*

(f) *Espr. des Loix*, 28, 2.

(g) *Antichita Ital. Dissert. 22.*

she returned to the law of her fathers. The Roman law was regularly the law of the church and of all ecclesiastics; but, if a person who had children entered the church, the alteration of his law did not affect his descendants. It is to be observed, at the same time, that, in the case of ecclesiastics, as well as of married women, the change of law was not an imperative obligation, but merely a privilege, which they were at liberty to waive, as appears from the tenor of several ancient documents. A freedman, among the Burgundians, enjoyed his paternal law; among the Lombards, he became subject to the law of his patron; but the Ripuarians recognized two forms of manumission, a Ripuarian and a Roman, each of which conferred upon the freedman the corresponding law; and it rested with the master to determine which of these forms should be used. Illegitimate children alone had the power of choosing the law which was to regulate their lives; (*h*) for, inasmuch as they were *nullius filii*, they could not inherit any.

The many perplexities which must have resulted from the collision of these various rules of conduct, may easily be conceived. The constitution of the courts must have presented no small difficulty; for, it is obvious that the assessors, upon whom the duty devolved of pronouncing judgment, must, in each case, have been of the same law as the parties; and, if the case was of a complicated nature, involving the interests of several persons professing different laws, the court must necessarily have been of the most heterogeneous description. An instance of this kind occurs in an imperial *placitum* held at Ravenna in 967, (*i*) where the court was composed of Romans, Franks, Lombards, and Saxons. Some few of the general principles which guided the courts in the application of the different laws to particular cases have been preserved to us. The composition for crimes was determined by the law of the aggrieved party. In civil matters, the law of the defendant regulated the decision; but, in later times, deviations from this rule occur; and judgment appears to have been pronounced upon a comparison of the respective laws of the parties. (*k*) The validity of all judicial acts, oaths, bonds, wills, &c. was determined by the law of the person performing the act. The Burgundians, however, had the option of employing either the Roman or the Burgundian form

(*h*) "Justum est ut homo de adulterio natus vivat qualem legem voluerit." *Quæstiones ac Monita. Canonici* 1, 224.

(*i*) "Residentibus cum eis Romanorum, Francorum, Longobardorum atque Saxonum (Ala) mannorum genus." *Fantuzzi Monum. Rav.* ii. 28. In another *placitum*, cited by

Valsette (*Hist. de Languedoc*, t. ii. preuves p. 36.), Romans, Goths, and Salian Franks appear among the assessors. These are by no means solitary instances.

(*k*) "Collatis Justinianæ et Longobardorum capitulis legis,—dederunt sententiam." *Mabillon ann. Bened.* tom. iv.

in the execution of wills or grants. Marriage was celebrated according to the law of the man.

The vivid imagination of Montesquieu (*l*) discovers, in the system of personal law, only a natural consequence of that unbounded spirit of freedom which breathed in all the institutions of the northern tribes, in the midst of their native wilds. Personal law, he alleges, prevailed among the barbarians before they emigrated, and it followed them into their new possessions. The explanation given by Savigny of this political phenomenon, if it be not so attractive to the admirers of the barbarous virtues as that of Montesquieu, has at least more of sober probability in it; and it has the additional advantage of being supported, also, by historical evidence. When the northern invaders first settled upon Roman ground, they permitted the vanquished inhabitants, either from an excess of magnanimity, or, as we are rather disposed to believe, from an excess of contemptuous indifference, to retain their laws and customs. Of the fact there is abundant proof in the barbarian codes, in the formularies, and in the royal decrees. But, with the exception of the Roman law, none appears to have existed, at that period, in any of the newly established kingdoms, at variance with the law of the ruling tribe. Thus, in the Salic code, the earliest of all the barbarian compilations, two classes alone are mentioned—Franks and Romans. Thus, also, in a law of the Lombard King Liutprand, (*m*) notaries are strictly enjoined to frame all documents either according to the Lombard or the Roman law. The Roman law was, consequently, the only personal law, if such it could be called, then in force; and any German stranger was obliged to conform to the laws of the state in which he sojourned. But, as the Franks extended their conquests, and gradually subdued the other German tribes, the same course was pursued in the treatment of the vanquished that had been before adopted in the case of the Romans. All were permitted to retain their own laws; the different tribes became intermingled in large masses; until, under the Carolingian dynasty, the system of personal law was generally recognized, in all its chequered variety, throughout the new empire of the west.

We must not omit to state that, in all the barbarian kingdoms, certain legislative provisions existed, which checked and circumscribed, in some degree, the operation of personal law, and by which the ruling tribe asserted its supremacy. Such were the chapters of the Salic and Ripuarian codes, which regulated the unequal compositions to be paid by Franks and Romans, in particular cases of injury. Of this nature, also, were the capitularies;

(*l*) *Espr. des Lois*, 28, 2.

(*m*) *Leg. Longobard* 1, 29, 2.

some of which were merely additions to, or modifications of, the codes of the different tribes, such as the *capitula addita ad legem Salicam*: others, on the contrary, were of a general character, equally binding upon all the members of the state, from whatever stock they might have descended.

In the north of France, personal law was supplanted by the feudal customs; in the south, where the great body of inhabitants were of Roman extraction, the Roman law, from being personal, became territorial; and hence the distinction between the *pays coutumier* and the *pays de droit écrit*, which continued down to the time of the promulgation of the Code Napoleon. In Italy personal law existed even as late as the fourteenth century, the last profession of the Lombard law being of the year 1388, dated Bergamo.

We have been induced to dwell thus long upon the subject of personal law, because it seems to have been very imperfectly understood by all the writers, if we except Lupi, (a) who have preceded Savigny. In the development of this curious system, our author has displayed, in a pre-eminent degree, the varied resources of his powerful and discriminating intellect. Whoever will compare his labours with the twenty-second Dissertation of Muratori (o), which treats upon the same subject, will perceive, with astonishment, the different use that may be made of the treasures of erudition by minds differently constituted. The Italian is evidently embarrassed by the richness and diversity of the materials which he has himself collected: with less learning he would have been more instructive. The German Professor luxuriates in the abundance of his stores;—under his master-hand every thing appears to find its appropriate place, without constraint, without effort;—

Ut sibi quivis

Speret idem;—

every thing seems to conspire to produce order and symmetry.

But to resume: The Romans, we have seen, were not bereaved of their law by the northern invaders; we must now examine what was their condition with respect to property; for, to grant them permission to retain their law, and at the same time to strip them of their property, would savour somewhat of the provoking proposition made to Catherine the shrew—

“Why, then, the mustard without the beef.”

The war which the barbarians waged with the provincials was

(a) Codex Diplom. Civ. et Eccl. (a) Antichita Ital. Bergomatis.

not a war of extermination. The unresisting submission of an enervated and degenerate people may have excited in the conquerors feelings of contempt, but left little scope for the exercise of the vindictive passions. Accordingly we find that, after the first shock of the irruption, the invaders acted with singular temper and humanity; not only granting to the Romans life and personal liberty, but securing to them also a proportion of their property. The share of land which the Burgundians appropriated to themselves was two-thirds. We are not, however, to imagine that two-thirds were severed from the entire land of the Romans, and then divided among the Burgundians; but each Burgundian freeman had a Roman *hospes* assigned to him, with whom he shared land in the proportion stated; he obtained also one-half of the court and garden, and a third of the slaves of his *host*. In such an individual allotment, as the number of Roman proprietors exceeded the number of the invaders, some property necessarily remained untouched; and it was from this reserve, and not, as Mr. Spence supposes, from the one-third which upon the first partition was left to the Romans, that the subsequent adventurers of the Burgundian tribe, and the freed-men were provided for, the former receiving one-half of the land without slaves, the latter one-third of the land of their respective *hosts*. The same plan appears to have been adopted by the Visigoths in the apportionment of the conquered land. The Ostrogoths signalized their moderation by claiming only one-third of the land of their *hosts*; but they proceeded upon a system which equalized the burthens of all the subject Romans; demanding, for the use of the king, a third of the produce of the surplus land, that remained after the allotment. Of the distribution of land among the Franks we are possessed of no information. With respect to the Lombards, opinions the most unfounded have been propagated by Lupi, Fumagalli, and Sismondi, (p) who represent them in the character of unscrupulous marauders, plundering the Roman inhabitants of the whole of their property, and reducing them to a state of abject slavery. Our author proves very convincingly that the Lombards emulated the moderation of their predecessors in Italy, the Ostrogoths, contenting themselves with a third of the property of the conquered; with this difference,

(p) "C'est ainsi que toutes les provinces de l'empire Romain furent partagées entre les barbares du Nord, et que les cultivateurs, comme de vils troupeaux d'esclaves, demeurèrent attachés aux terres qu'ils faisoient valoir; c'est ainsi que, dans un temps plus rapproché de nous, les Espagnols, qui conquièrent le Pérou et le Mexique

se firent donner des provinces en patrimoine." *Republ. Ital.* 1, 60. Sismondi grievously wrongs the barbarians of the North, by comparing them with the conquerors of Mexico: civilization alone could produce such monsters as Cortes and his sanguinary followers.

however, that in lieu of an actual share of the land, they exacted a third part of the produce of the soil. Severe, then, as the losses unquestionably were of the Roman proprietors, it is at least evident, that they were not afflicted with the scourge of indiscriminate rapine; and it may reasonably be questioned, whether even with the privation of two-thirds of their property, as under the Burgundian sway, the inviolable security with which they enjoyed the remainder, may not have rendered their condition more tolerable than under the wanton oppression, the arbitrary and relentless exactions of an imperial Verres.

The fate of the different cities of the Western empire during this period of universal change, is a subject of still deeper interest than even the condition of the landed proprietors, and is intimately connected, as we shall presently see, with the destinies of modern Europe. The northern conquerors, we have every reason to believe, carried with them into their new possessions their hereditary distaste (q) for the confinement of towns,—a confinement which they were taught by their ancestors to dread, as calculated to unnerve the energies, and quell the proud spirit of independence. (r) Formed into district associations, they dwelt in the open country long after their first settlement. The few that took up their abode in the cities were not properly members of the municipal community, but belonged to the district in which the city lay; and it is probable, as Savigny conjectures, that the term *habitor*, which occurs in charters of the eighth and ninth centuries, annexed to the names of German inhabitants of a city, may have been employed to distinguish the fortuitous German resident from the regular Roman citizen. Under these circumstances it is not surprising that the invaders abstained from any interference in the internal regulation of the cities and towns. The constitution of the state was, indeed, fundamentally altered; the higher Roman authorities perished with the empire; the rectors of the provinces were supplanted by counts of districts; but the puny senates of the towns were still suffered to exist; the civic magistrates still exercised their authority; local jurisdiction remained undisturbed: thus means were afforded for perpetuating the Roman law, which, without the aid of these institutions, must have fallen into complete and irreparable decay; thus, also, were kept alive the embers of that municipal freedom, which was destined at a future

(q) "Ne pati quidem inter se junctas sedes. Colunt discreti ac diversi." Tacitus de Mor. Germ. 16.

(r) "Etiam fera animalia, si clausa teneas, virtutis obliviscuntur,"—is the argument which Tacitus puts

into the mouth of the ambassador of the *Tencteri*, when urging the inhabitants of *Colonia Agrippina* (Cologne) to throw down their walls, "*muros, munimenta servitii*." Hist. iv. 64.

day to reanimate the arts, industry, and intelligence of Europe, and to humble the pride of the Cæsars.

Of the continuance of the municipal institutions in the kingdom of the Visigoths, we have the most indisputable evidence in the digest of Roman law, which is distinguished by the name of the '*Breviary*' (*Breviarium*, or *Breviarium Alaricianum*).^(s) This compilation was framed, for the use of the Roman inhabitants of that kingdom, by the authority of Alaric the Second, in the year 506, consequently, twenty-two years before the commencement of those labours in jurisprudence which have immortalized Justinian. It consists of two parts: the text, comprising extracts from the Theodosian code, from the Novels of Theodosius, Valentinian, Marcian, Majorian, and Severus, the works of the jurists, Caius and Paulus, and the Gregorian and Hermogenian codes; and an *interpretation*, which accommodated these dispositions of the Roman law to the existing relations of society. The *interpretation* is therefore of the highest historical value, as it presents us with a faithful picture of the political condition of the Romans. From it we learn, that the *defensors* continued to occupy the same important post in the internal government of the cities as formerly; that the *decurions*, also, maintained their pre-eminence; and that the *curia* not only preserved its jurisdiction and general administrative authority, but, in fact, enjoyed a larger share of power and consideration than under the emperors. As long as the *breviary* possessed the force of law in the kingdom of the Visigoths, so long must the municipalities have existed in undiminished vigour. It is well known, however, that about the middle of the seventh century, the Visigothic monarchs formed the design of abolishing those impolitic distinctions of blood, which perpetuated discord among the inhabitants, and paralysed the national energies, and of blending the Goths and Romans in one firm and united body. With this view, they removed the prohibition of intermarriage,

(s) Mr. Spence is entirely mistaken in the account which he gives of the *Breviary*. He says, that Alaric "caused Anian, a famous civilian, to compile from the Theodosian code a code of laws for the use of his subjects, which compilation went by the name of the *Breviarium Aniani*."—p. 252. But it is evident from the rescript (*commonitorium*) which is prefixed to the work, that it was compiled by an assembly of jurists, and not by Anianus, who was himself no famous civilian, but the *referendary* of Alaric, and had no other

hand in its preparation, but that of authenticating by his signature the official copies that were dispatched to the counts of the different districts. It was compiled from other sources beside the Theodosian code, for the use of the Roman, and not the Gothic subjects of Alaric. The name *Breviarium*, moreover, is not older than the 16th century; before which period the work was sometimes denominated simply *Lex Romana*, sometimes *Lex Theodosii*, from the large share of the Theodosian code contained therein.

which had hitherto estranged the conquerors from the conquered; and, having framed a code of laws which they deemed adequate to the wants of the nation (*t*), they interdicted the use of the Roman law throughout their dominions. From that period, we have no means of ascertaining the state of the cities in the kingdom of the Visigoths: it is manifest, however, from the mention that is made in their code (*u*) of the *defensor* as a magistrate, that the municipal institutions were not wholly abrogated.

We need look no farther than the various collections of *formularies* for ample proof of the uninterrupted continuance of the municipal bodies in the kingdom of the Franks. In these records, the decurions appear sometimes under the name of *curia*, sometimes *ordo*, with the *defensor* or *principalis* at their head, exercising the same judicial functions as before the destruction of the western empire. The *curator*, or *quinquennalis*, also makes his appearance. Wills are executed, or solemnly opened, grants registered, the ceremony of adoption performed before the *curia*, according to the strict forms of the Roman law. The *formularies* have not altogether escaped the attention of Mr. Spence, who accordingly states, that "a peculiar and exclusive jurisdiction was permitted to be exercised by the magistrates and council of particular cities:" but a more detailed examination of these documents would have prevented him from thus limiting, to particular cities, a disposition of universal prevalence. In addition to the *formularies*, Savigny has illustrated his subject by a long series of charters, which place the existence of municipalities in France, during the dark ages, beyond the possibility of doubt.

The memory of Roman institutions was preserved in the tradi-

(*t*) Ll. Vis. 2. 1. 26.

(*u*) The law of Chindaswind, which prohibits the use of the Roman law, encourages its study:—"Alienæ gentis legibus ad exercitium utilitatis imbui et permittimus et optamus; ad negotiorum vero discussionem et resultamus et prohibemus. Quamvis enim eloquiis polleant, tamen difficultatibus hærent: adeo cum sufficiat ad justitiæ plenitudinem et præscrutatio rationum, et competentium ordo verborum, quæ codicis hujus series agnoscitur continere, nolumus sive legibus Romanis, sive alienis institutionibus amodo amplius convexari."—Ll. Visig. 2. 1. 9. The Visigothic code which is thus pronounced to be sufficient for all the ends of justice, (*ad*

justitiæ plenitudinem), is very differently estimated by Montesquieu, (28. I.):—"Les lois des Wisigoths sont pueriles, gauches, idiotes; elles n'atteignent point le but; pleines de rhétorique et vides de sens; frivoles dans le fond, et gigantesques dans le style." It may be observed, however, that Gibbon taxes this sentence of Montesquieu with an excess of severity:—"I dislike," he continues, "the style; I detest the superstition; but I shall presume to think, that the civil jurisprudence displays a more civilized and enlightened state of society than that of the Burgundians, or even of the Lombards."—Vol. vi. p. 379. We feel rather disposed to coincide with the French writer.

tions of many towns in France down to a very late period. In the 16th century, when the special jurisdiction of French towns was abolished by the edict of Moulins, Rheims was exempted from the operation of the edict on account of the high antiquity of its privileges. (v) Other cities, such as Toulouse, Lyons, and Angoulême, in which similar traditions had been fondly cherished, were not so fortunate in obtaining a confirmation of their rights. It is deserving of remark, that the Abbé Dubos, whose extravagant hypotheses have rendered his name a by-word for historical temerity, has stumbled upon far correcter views of the condition of the towns in France, than those entertained by his more reflecting and logical critics. (w)

The large share which the Italian republics had in the regeneration of Europe, the gigantic efforts by which they achieved their independence, and the brilliancy of their career, alike in arms as in all the arts of civilization, give a peculiar degree of interest to the popular institutions which produced so much intellectual and moral vigour. The resemblance which the municipal communities of the 12th century bore to the Roman *municipia* is, in general character, most striking; and would, of itself, induce us to trace the one to the other. But this is at variance with the prevalent opinion. Almost all the writers who have treated upon the subject assume, that every vestige of municipal government in the Italian cities was destroyed by the barbarians, and that the popular institutions of reviving Europe were wholly new, and unconnected with those of an earlier date. As to the precise period at which the Lombard cities were erected into municipal communities, they are somewhat undecided. Muratori seems disposed to fix the time about the year 1000; but certain documents, the authenticity of which cannot be disputed, such as a letter of Pope John the Eighth, of the year 882, addressed to the Lombard city *Valva*, ("Clero, *Ordini, et Plebi* Valvensis ecclesiæ"), make him vacillate, as usual, in his opinion. (x) Sismondi, however, unhesitatingly asserts that the cities assumed a municipal form of government during the reign, and under

(v) "La cour ordonna par son Arrêt du 25 Mai, 1568, que les dits Echevins jouiroient de leur jurisdiction non obstant l'edit de Moulins, ainsi qu'ils avoient fait ci-devant, parce qu'il fut reconnu qu'il ne se devoit étendre sur les villes de cette qualité, qui en jouissoient avant que la France fut en royaume."—Bergier ap. Dubos.

(w) *Etablissement de la Mon. Franç.* liv. 6, c. 11.

(x) "Potrebbero queste poche notizie insinuare, che anche né secoli

prima del mille anche il popolo formasse un corpo, non privo di qualche regolamento e Magistrato." Antich. Ital. Dissert. 18. But he scouts the idea of tracing these modern communities to Roman origin:—"Che se ci sono persone, le quali attribuiscono questa prerogativa ed autocrazia molto prima, e fino allorchè Roma ebbe i suoi propri potentissimi Imperadori, certo è ch'essi o prendono abbaglio, o debbono cercar solamente dei lettori troppo creduli." Diss. 45.

the auspices, of Otho the Great, (y) consequently about the middle of the 10th century; but he produces no evidence to support his assertion, nor is there the slightest ground for supposing that any important political changes were effected in Italy during the reign of Otho, or of his immediate successors. Gibbon alone, of all the authors who have preceded Savigny, appears to have thought correctly upon the subject; (z) but what in Gibbon was little more than a vague surmise, is demonstrated by our author. He proves that through the many vicissitudes of revolution which Italy underwent in the dark ages, the cities retained their senates, their jurisdiction, and the semblance at least, of a popular administration.

To begin with Odoacer:—The dominion of the Heruli was of too short a duration (aa) to produce any fundamental change in the constitution of the cities in Italy. In the establishment of the kingdom of their successors the Ostrogoths, Roman customs and Roman institutions were not only respected by the invaders, but regarded as models of imitation. "It had been the object of Augustus," observes Gibbon, "to conceal the introduction of monarchy; it was the policy of Theodoric to disguise the reign of a barbarian." The military force of the state was composed solely of Goths; but the political system of the Romans met with veneration rather than forbearance. The senate of Rome, the public functionaries, the governors of the provinces were maintained in their dignities; of the *curiales* of the cities Cassiodorus makes frequent mention; and the same author gives the *formulae* for the appointment of a *defensor*, and a *quinquennalis*. The edict of Theodoric, the earliest code of laws that was framed after the annihilation of the western empire, (bb) was compiled exclusively from Roman materials,—principally from the Theodosian code, and the *Receptæ sententiæ* of Paulus.

In 553 the power of the Ostrogoths was destroyed by the victorious arms of Narses. Fifteen years afterwards, the Greeks were in their turn expelled from the greater part of their conquests by the Lombards. All that remained to them was Ravenna with the *Exarchate* and Pentapolis, Rome with its territory, and some parts of lower Italy; and of this remnant, Rome and Ravenna were wrested from their possession towards the conclusion of the eighth century. The continuance of the municipal communities, under the Greek sway, is attested by a number of original

(y) Republ. Ital. tom. 1, c. 6.

(z) Robertson and Hallam fall into the general error.

(aa) From 476 to 493.

(bb) The edict of Theodoric was

promulgated during a passing visit of the king to Rome in the year 500, twenty-eight years before the commencement of Justinian's compilations.

charters written on papyrus, and embracing not merely a considerable period of the dominion of the Greeks, but the times also of Odoacer and of the Ostrogoths. In these interesting and precious documents, for which we are indebted to Marini, (cc) we discover the senates, the magistrates, the ancient forms of procedure still in complete vigour. The letters of Gregory the Great to different Italian cities in subjection to the Greeks, contain abundant testimony to the same fact. Many bear the superscription of "*Ordini et Plebi*," or "*Nobilibus et Plebi*;" some are addressed to magistrates of the cities; in some the necessity of the *gesta municipalia* in grants made to the church is expressly inculcated; in others, directions are given that persons liable to serve in the *curia* should not be admitted to holy orders.

We have already remarked that the greater part of Italy was soon torn from the feeble hands of the Greeks by the Lombards. In Rome, Ravenna, and the few other cities that yet remained in the possession of the former, a change took place early in the 8th century, which assimilated their condition very much to that of the *prefectures* in the time of the Roman republic. They lost their elective magistrates, and with them the popular principle of their constitution. They still retained their senates, and a single elective public functionary, the *pater civitatis*, corresponding with the *quinquennalis* or *curator* of earlier times; but their chief magistrates, civil and military, the *dux* and *dativus*, with whom all jurisdiction rested, were nominated by the *Exarchs*. The nomination of the magistrates, in Rome and Ravenna, subsequently devolved upon the Popes. These facts are especially deserving of notice, because it has been supposed by some, that the Lombard cities, in the 11th and 12th centuries, borrowed their republican institutions from those of their neighbours who still remained subject to the eastern empire. The reverse is actually the case; and it is a circumstance as remarkable as it is certain, that municipal freedom was preserved in the dominions of the Germans, while it was destroyed in those of the Eastern Emperors, and that the Greek cities of Italy only recovered their independence by imitating the cities of the Lombards.

The direct proofs of the continuance of the municipal communities under the Lombards are to be found in the letters of Gregory the Great, in the letter of Pope John the Eighth, to which we have before adverted, and above all in the *Codex Utinensis* (dd). This code, which is a mere modification of the Visigothic *Breviary*, adapting the dispositions of that body of laws to the existing cir-

(cc) Papiri diplomatici raccolti ed illustrati dall' Abate Gaetano Marini in Roma, 1805.

(dd) Published by Canciani in the 4th volume of his collection, under the title "*Lex Romana*."

cumstances and wants of the Romans in the Lombard kingdom, was composed at the end of the 9th or the beginning of the 10th century. It is still more barbarous, in matter as well as language (*ee*), than the *Breviary*; but, like its prototype, it exhibits in their genuine colours the political and civil relations of the people for whom it was framed.

The continued existence of the ancient municipal institutions being once established, all that is marvellous and mysterious in the origin of the Italian republics of the 12th century vanishes into air. That existence, feeble as it was, and powerless for the production of any present benefit, contained within it the seeds of regeneration, and only waited for altered circumstances, to expand into full life and vigorous exertion. In the Italian republics we cease to see any thing fortuitous or strange. We no longer regard them as called into being by the nod of a German emperor, as the creations of the generosity, the policy, or the caprice of an Otho. We recognize in them the renovated forms of long-past glorious times.

Our observations upon the first volume of Savigny's work have extended to so great a length, that we must confine our notice of the remainder to little more than a mere indication of the course which the author has pursued. In order to complete his proofs of the continuance of the Roman law in the dark ages, he has arranged his materials in four classes:—1. The codes compiled for the use of the Roman subjects in the different barbarian states. 2. The barbarian codes themselves. 3. Ancient charters and other documents, also historical accounts of actual legal proceedings, of suits, contracts, wills, &c. And 4. Works upon Roman law, written during the period in question.

In the kingdom of the Burgundians, between the years 517 and 534, a code was framed for the use of the Romans, partly drawn from the Visigothic *Breviary*, and partly from the pure sources of the Roman law. It usually bears the title "*Papian*." In the national code of the Burgundians there are undeniable traces of the Roman law; but the *Breviary* appears to have been the authority employed by its compilers.

(*ee*) The following specimens of the style of the work will furnish us with some idea of the learning of that period:—"De filios familie, hoc est si filius sine uxorem fuerit, aut si ad Rege, vel ad alterum patronum commendatum non fuerit." "Mutus homo et emere et vendere potest; nam furiosus hoc est furiosus, qui multum senex est, qui ille qui in nimiam etatem est,

jam nec emere nec vendere non potest." These examples will remind our readers of the case of conscience which is solved in the Canon law, as to the validity of the ceremony of baptism, where the priest expressed himself thus, "Baptizo te in nomine Patria, et Filia, et Spiritus Sancta." Decret. de Consecratione, Can. 84.

The Visigothic *Breviary* we have already described. Five abridgements or modifications of this work have been made at different times:—one by William of Malmesbury, which is mentioned by Selden (*ff*)—the *Codex Utinensis*—upon which we have above remarked; and three others, which our author considers to be of Frankish origin. The national code of the Visigoths, although it abolished the Roman law generally, contains within itself many doctrines and dispositions of that law.

No compilation was made from the Roman law for the express use of the Roman inhabitants of the kingdom of the Franks. The German laws of that kingdom consist of the codes of the different component tribes, and the Capitularies. Among the former, Roman law is to be found only in the codes of the Bavarians, the Alemans, and the Ripuarians. The Capitularies contain a large share of Roman law drawn from various sources—from the *Breviary*, the genuine Theodosian code, the code of Justinian, and the collection of novels which bears the name ‘*Julian*.’ In the ancient records of the Frankish states, and in their historians, there is abundant evidence of the use of the Roman law. In the formularies, also, there are passages from that law: many taken from the works of Justinian. But the most important document is a work which was written at Valence, about the middle of the 11th century, under the title ‘*Petri Exceptiones Legum Romanorum*.’ (*gg*) It is drawn exclusively from the compilations of Justinian, from the Institutes, the Pandects, the Code, and the Novels; and amongst these, the Pandects take a prominent place.

In Italy, under the Ostrogoths, the edict of Theodoric was the law for Romans as well as Goths. Its origin we have above explained. When the Greeks recovered Italy, the pandects and code were dispatched thither by the provident wisdom of Justinian, as we learn from his *Sanctio Pragmatica* (*hh*), and necessarily supplanted the edict of Theodoric. We are possessed of copious materials to enable us to form an estimate of the state of the Roman law in Italy under the Lombard sway. The national code of the Lombards exhibits, in itself, many traces of Roman law. In the Lombard kingdom, also, the documentary evidence is more complete than elsewhere; and some of the charters attest the use of the pandects. The historians speak the same language. There is, moreover, the work entitled ‘*Questiones ac Monita*,’

(*ff*) Ad Fletam, 7, 2, and Uxor Hebr. 3, 12.

(*gg*) There is one edition of this work, printed in 1500, at Strasburg.

Its extreme rarity has induced our author to print it in full in the appendix to his second volume.

(*hh*) Cap. 11.

(ii) written about the year 1000, which contains passages from every part of Justinian's compilations; and the *Brachylogus*, (kk) an abridgement of the Roman law, composed about the year 1100, upon the model of Justinian's Institutes, and comprising parts, also, of the Pandects, the Code, and the Novels. We have already seen that the Pandects, as well as the other works of Justinian, were known and used in France throughout the dark ages. We now see, that they were not only known and used in Italy during the same period, but studied, abridged, and excerpted; not very scientifically, it must be granted, but in such form and manner as suited the intellectual twilight of the times. What shall we say, then, to the wonder-working discovery at Amalfi? The dignity of that precious manuscript, the glory long of Pisa and Florence, appears—

A counterfeit
 Resembling majesty, which, touch'd and tried,
 Proves valueless.

Our author's second volume, of the contents of which we have thus given but an imperfect summary, brings us down to the 12th century—a great intellectual and political crisis, when the reviving freedom of the Lombard cities gave a fresh impulse to the mind and energies of Europe, in which the study of the Roman law so fully participated. The third volume gives a description of this change, followed by an account of the various universities at which the Roman law was studied; and a critical notice of the sources of Roman law used by the Glossators. In his fourth and fifth volumes, the former of which has already appeared, the author has proposed to give a history of the Glossators, during the 12th and 13th centuries: the sixth, and concluding volume, is to embrace the two remaining centuries of the Middle Ages.

For the present, we take our leave of Savigny, filled with the liveliest admiration of his unusually varied talents, and gratitude for the services which he has rendered to history and law.

(ii) Printed by Muratori, from two manuscripts, at Milan, in his Script. Rer. Ital. t. 1, p. 163, and thence copied into Canciani. 1, 221.

(kk) There are two editions of the *Brachylogus*, published from manuscripts, Lugd. ap. Sennetonios. 1549. fol., under the title '*Corpus legum*

per modum Institutionum;' and Heidelberg. 1570. 8vo., with the title '*Enchiridion juris instar Imperialium Institutionum*;' &c. From these two there have been eleven reprints. The name *Brachylogus* is comparatively modern.

ART. IV.—CORPORATION AND TEST ACTS—

13 & 25 Car. II.

THE penal laws directed against the Roman Catholics have, for many years, furnished topics for incessant discussion; and an equally important and fruitful subject for debate and excitement seems now to be opening with regard to the Corporation and Test Acts, as they affect Protestant non-conformists. We have never heard any sufficient reason assigned why, during the long conflict on the Catholic question, the Protestant Dissenters have for upwards of 30 years remained comparatively quiet, unless it has been that they despaired of reason and argument availing to procure for them what even the most imminent dangers from a refusal have not yet been able to extort from the slowly awakening faculties of our legislators. It may perhaps also be remarked that, among many Dissenters the fear of injuring the Catholic cause, by rousing high church feelings, has had its influence in preserving neutrality. Among a few too, on the other hand, who have the inconsistency to refuse to others what they ask for themselves, the Catholic question has been equally a reason for remaining quiet; first, because to stir would be to involve them in awkward inconsistencies; and, secondly, because fortunately we do not think there is a man in the House of Commons, (unless it be the enlightened member for Bristol,) who could be found to advocate their cause in the same breath that he opposed that of another class of religionists.

The claims of the Dissenters are, however, revived. Being once agitated, they must occupy a large share of public attention, and though we think we should be insulting the common sense of our readers if we were to enter gravely on any lengthened argument against the folly and impolicy of keeping up these absurd exclusions, we are desirous of stating, as shortly as we can, what these laws are, which every one knows by name, but with which few have much real acquaintance. As a symptom of the interest likely to be directed to this question, viewing it as a mere branch of legal inquiry, a law-book has already made its appearance (the first we believe of its kind), by Mr. Beldam, as "A Summary of the Laws peculiarly affecting Protestant Dissenters." The book bears the marks of hasty compilation, is sometimes inaccurate, and seldom sufficiently filled up in its details; but it supplies a glaring deficiency tolerably well, and its effect will be to shew, more pointedly and convincingly than an argumentative dissertation probably would succeed in doing, what a chaotic and ill-digested piece of patch-work our code on this sub-

ject is ;—how much it displays of prejudice, and of the party feelings and excitements of turbulent periods ;—how little there is that is founded on principles which the mature consideration of an enlightened legislator of the present day would deem it necessary or justifiable to adopt.

“Political considerations apart,” Mr. Beldam cautiously observes, “the tendency of the present work will probably be to show the propriety of entirely new enactments : but whether such enactments ought more clearly to define and perpetuate the ancient laws, securing to Protestant Dissenters, by less equivocal provisions, the immunities and privileges they at present enjoy ; or whether, on a broader principle of legislation, it were better to abolish the ancient system, and to enforce such modern restrictions as may be thought necessary by modern sanctions alone, must be left to the legislature to decide.” It would be a curious circumstance, if some consolidator and amender of this part of our penal code should give the go-by to the Catholic and Dissenting questions, and propose to us a short, plain, and simple repeal of a host of statutes, many unintelligible, all disgraceful to a civilized country ; substituting one rational oath and declaration, to be taken on acceptance of office, for securing, as far as religious sanctions can secure, the due discharge of the duties of a citizen.

Our object, at present, is briefly to state and explain the nature and object of the exclusive laws which are complained of by Protestant Dissenters, with a few particulars of their history ;—the Catholic being, in fact, affected by the same laws, but having several other peculiar and more oppressive enactments directed against him, which prevent his thinking so much of more remote or less urgent grievances.

Protestant Dissenters are excluded from the common privileges of citizens, from aspiring to those honours which are or may be the objects of ambition, and the stimulants to exertion, by two acts passed in the reign of Charles II. ;—a happy period to select for the mature establishment of bulwarks to constitutional liberty. These acts are known by the names of the Corporation and Test Acts. We will briefly state the objects of those clauses which constitute the regulations now dwelt upon as constituting the grievance complained of by Protestant Dissenters.

The Corporation Act was passed in 1661, soon after the return of Charles, and entitled (dating the reign from the demise of his father) 13 Car. 2, stat. 2, c. 1. The immediate design of this act, as appears by its preamble, history, and regulations, was to provide a remedy against disputes between rival claimants to corporate offices, between the persons who had been ejected during the late troubles, and the actual occupants, who, if

Charles's word was worth any thing, ought not to have been disturbed. In short, the object was, to expel the adherents of the late order of things in a summary way. All the clauses but one, therefore, look to a temporary purpose. Commissioners are appointed, with arbitrary powers, for the arrangement of all disputes, and they are directed to administer to those whom they should select the oaths of allegiance and supremacy, together with an oath disclaiming the legality of bearing arms against the King, and a declaration against the League and Covenant. Almost at the end of the statute comes a clause of a *permanent* character, by which it is provided that, *after* the expiration of the commission in 1663, no person should be placed or admitted into any office of magistracy, or place or employment in the government of cities, corporations, boroughs, cinque ports, and other port towns, who had not, one year before his election or choice, taken the sacrament of the Lord's Supper, according to the rites of the Church of England, and who did not, when elected, take the oaths of supremacy and allegiance, and the further oath and declaration above mentioned, which last-mentioned oath and declaration have been since repealed. The election of any person not so qualified is declared void.

The Act of Uniformity having passed soon after, (which created that great body of persons now known by the name of Protestant Dissenters, but who did not exist as such when the Corporation Act passed), we come next to the *Test Act*, passed in 1672, 25 Car. 2, c. 2. This act is entitled, "An Act for preventing Danger which may 'happen from *Popish Recusants*.'" It provides, that every person admitted into office, civil or military, or receiving any pay, fee, or wages from the King, or holding any command or place of trust under him, or under his authority, or authority derived from him, or in his household, or *that of the Duke of York*, (a curious association of an individual with the King, very illustrative of the temporary character of these provisions), shall take the oaths of supremacy, allegiance, and abjuration, and subscribe the declaration against transubstantiation, and shall, within three (afterwards enlarged to six) months, receive the sacrament, and produce a certificate thereof, under the penalty of incapacity for the office, and avoidance of the appointment, and (in case of acting without compliance) of being subject, on conviction, to disability for suing in any court of justice, acting as a guardian, executor, or administrator, or receiving a legacy or gift, or bearing any office in England or Wales; and also to the payment of a fine of 500*l.*; the whole of which goes to the informer, and is therefore not mitigable by the Crown, nor relieved by the statutes of limitations. The provisions of this act do not, of course, extend to exclusion from Parliament, this being effected by a subsequent act (30 Car. 2,) which pur-

ports to be intended to give greater effect to the Test Act, and excludes the Catholics by prescribing only a declaration against Popery, to be signed as a qualification for a seat in Parliament, but contains nothing which affects any Protestant sect.

Having seen the provisions of these two famous acts, we will notice a few facts relating to their history.

It is rather curious, that in the Corporation Act the sacramental test was not imposed on those against whom the act was aimed, viz. the then holders of offices. It was only in more quiet times, when present mischief had been removed, that future holders were to be required to take this test. The truth is, the clause was not in the original bill at all, nor dreamt of by the promoters, whose object was totally different. It was an after-thought, when the bill had been five months under discussion, and after two conferences between the Houses; and it was conceded by the Commons at last (who were very impatient at the attempt to turn a temporary measure into a "permanent change") by way of compromise, the Lords having endeavoured to force in clauses making all corporations renew their charters, and vesting the perpetual nomination to their principal offices in the Crown.

The House of Commons at that time contained a great many Presbyterians; and a great number of the church livings were actually held by them. Charles had promised at Breda a full liberty of conscience, and had described the Presbyterians as "persons full of zeal for the peace of church and state." At the time the Corporation Act passed, the Church and its Liturgy were, by royal proclamation, about to undergo revision, and conformity between different Protestant churches was common; so that a comprehension was never thought difficult, and was then fully expected. When a House of Commons, therefore, in 1661, consisting of a large body of Presbyterians, acceded to the sacramental test, according to the usages of the Church, to come in force in 1663, no one conceived, and the law could never contemplate, that before 1663 this Church would, by the Act of Uniformity, become one *more* exclusive than it ever before had been; and that this act would, in the result, proscribe many of those who were concerned in its formation.

In truth, the sacramental test (which had often before been used against the Catholics,) was never, among Protestants at that time, thought of as a means of exclusion between themselves. All the early Protestant Churches communicated together. Of fifty-six Presbyterian members in the House the very year the Corporation Act passed, only two had objections to taking the sacrament, which was declared to be administered only "*to see if they were all Protestants.*" The Corporation Act, then, it is clear, was intended

for no such purpose as it now serves, and was wholly inoperative against Protestants, till the Act of Uniformity subsequently made subjects for it.

When the Test Act passed, it is perfectly obvious, and the title expressly declares, who were intended as the objects of it; and we cannot much wonder that the Dissenters should join, even to their own possible prejudice, in carrying a measure against so profligate a Sovereign, whose court and army were notoriously full of men hostile to the liberties of the country. It is well known that the Commons proposed, and that the Court (desirous to obtain favour with the Dissenters, for the sake of dividing opposition) promised to support, a clause excepting the Dissenters (who had now, by the Act of Uniformity, become a distinct body) from its operation; which boon they, knowing that it might hazard the bill elsewhere, and prevent the carrying so important a point against the designs of the Crown, declined to accept; and the bill itself was forced down by being tacked to a money bill. A separate bill, however, to exempt the Dissenters passed the Commons the same session; but this and several other measures for their relief were defeated by the King, who was now violent against them for foiling his schemes, and who adopted the lowest tricks for the accomplishment of his purpose; such as, in one case, getting a bill, which had passed both Houses, stolen away and concealed, so as not to be forthcoming when he pretended to come and give it the royal assent. In short, the whole of these boasted bulwarks of our liberties are only the creatures of temporary policy, of feelings and intrigues in some measure disgraceful to all concerned in them. They are mere measures resorted to for protection or annoyance at the moment, without a conception, on the part of any one, of the purposes to which time, chance, and the alteration of circumstances, would turn them.

These acts, too, by the process of time, acquired an operation which could not belong, or be expected to belong, to them when passed. We have already observed that Protestant Churches constantly communicated together; and even after the passing of the Act of Uniformity the practice was common. The non-conformists, in fact, considered it a duty to conform where they could, in matters not essential, in order to avoid what was then called "the law of schism." It was only, therefore, an alteration of opinion on this point, and an increasing sturdiness of principle, which gave the sting to these enactments. The unprincipled man, from whom the state would justly fear the most danger, could always derive abundant justification in the opinions and practice of the most respected and consistent leaders of his sect, for evading the operation of the prohibitory laws, if it suited his purpose.

In 1711, however, the Whigs made a profligate bargain with

Lord Nottingham, by which they sold the Dissenters, and passed an act against occasional conformity, which required not merely the sacrament but perfect and entire conformity from the holders of offices. Thus for the first time the supposed intent and spirit of the acts of Charles II. was put in actual operation:—but this act was repealed in 1718; and the repeal was considered by many as a virtual declaration of the legislature's opinion in favor of occasional conformity; the practice being in some measure *regulated* by a provision against magistrates taking the insignia of office to their dissenting places of worship. In fact, however, the Dissenters have been gradually growing more scrupulous and consistent on the subject; they think it not honorable to avow for any secular purpose a conformity which they habitually disavow; and thus honesty and principle give a force to these laws which laxity and indifference evade. It was at first proposed, by a clause in the bill of 1718, to have repealed the sacramental test altogether, and certainly if it be, as it was by that Act, declared, that the object of the Test Laws is not to enforce actual and habitual conformity, it is somewhat difficult to see why the shadow is to be retained when the substance is given up.

At the same period an alteration was, for public convenience, made in the Corporation Act: the election of persons not qualified was made not absolutely void, but voidable; and that only in the event of prosecution commenced within a limited time.

With this qualification the Corporation Act and Test Acts remain as the intrigues and factions of the reign of Charles II. left them. The church having got possession of power and the means of oppressing dissidents, and having ceased to want the assistance of the dissenters to keep out a common enemy, has cared little about the circumstances under which these Acts were passed, or the operation which events not then in contemplation have given them, and has stoutly stuck to them as the charter of its privileges. King William would fain have moderated this bigotry, but was unsuccessful; and so have been all succeeding undertakers of the task of preaching charity and sound policy to the votaries of exclusive and intolerant monopoly.

Under these statutes, therefore, the Dissenters, though the great supporters of constitutional liberty, and, therefore, even of the church itself, through seasons of trial and danger, have remained and still remain by law—incapable of moving out of the ranks,—unfit to hold any office of trust in cities or corporations,—any place of trust in any way under his Majesty, or under authority derived from him,—any commission in the army or navy, or place in the king's household, or to receive any pay, pension, or salary, under penalties which are equal to excommunication. To what extent these exclusions would go does not seem exactly settled, and the

country would doubtless now lean much to circumscribe them. But it appears by cotemporary authority that formerly they were held to apply to every species of authority derived from the Crown; and that even a license to sell ale or quack medicines, the collection of post-horse duties, and the lowest species of place or authority under the Crown, were held to require a qualification. Lord C. J. Holt held that the offices of censors of the college of physicians were within the Test Act; and it has been considered by Sergeant Heywood, in his able pamphlet, which enters fully into the subject, that all chartered and incorporated companies, the Bank, the India, Russia, and South Sea Companies, two of the Insurance Companies, and many hospitals and charitable institutions are within its compass. It is obvious that statutes of this sort could never be enforced; and we next come to the only apology ventured to be made for them, namely, that they are annually repealed, and therefore quite harmless, and that Dissenters are very unreasonable in being so discontented, when they are *only* insulted, not persecuted and ruined.

It is always urged that *Indemnity Acts* pass every year, which render these Acts a dead letter, as in fact public opinion to a certain extent would make them without such indemnities; and the question then is, whether these Indemnity Acts do furnish any complete protection against present mischief, or against what a Dissenter has a right to look for protection from, namely, a persecuting spirit, if it should again arise; whether such a system of legislation by acts annually nullified is creditable and just; and whether a Dissenter has a right, if these Indemnity Acts *do* virtually protect him from penalty, or annoyance, to complain of holding his liberty by such a charter.

Now these Indemnity Acts in the first place do not *purport* to provide an excuse and indemnity for any but those who have omitted to qualify "*through ignorance of the law, absence, or some unavoidable accident.*" Here is no provision for the wilful, deliberate, prepenal, non-conformist. The indemnity is given by enlarging the time for qualifying; and the person who receives the benefit takes it on the implied condition of qualifying at the enlarged period. A Dissenter never means to do this. The question, therefore, is, whether a conscientious Dissenter is within the scope of these Acts? or, whether a time-serving judge has not ample ground for holding that he is not? At all events, it is hard to hold Dissenters unreasonable for objecting to be satisfied with this sulkily sort of connivance, or to tell them now, that their grievance "*is theoretic, not practical,*" when in 1789, on the debate on the question of the repeal of the Corporation and Test Acts, Lord North made it a topic of accusation against them, that they *did* take the benefit of these Indemnity Acts, which he held were never intended for them.

In the next place they are totally useless where previous conformity is called for, as it may be at any election. The Indemnity Acts do not remove the legal incapacity: any one who gives notice on the part of a rival candidate that his opponent has not qualified, nullifies all his votes and gets his candidate returned, whatever be the majority against him; and thus the malice of one man may be, and often has been, made the means of defeating the wishes of a whole community. Apply this to the various offices which appear to be within the Test Laws, and it will be seen what mischief might be effected in a time of popular excitement.

Again, independent of the doubt as to the title of Dissenters to the benefit of the Indemnity Acts, their legal efficiency is very imperfect. The Judges in a late case (in *re Stevenson*, 2d Barn. and Cres. p. 34) have strained their construction, so as to give a prospective operation where the obligation of qualification had actually begun to run before the passing of the act; but it is plain that, if any one who comes into office *after* the date of an Indemnity Act remains six months without qualification, and a prosecution is commenced and carried to judgment (for which there is abundant time) before the passing of the next act, the offender is subject to the full penalties of the Test Laws; and it is questionable whether, having once become affected by the disabilities inflicted by them, he is or can be subsequently restored even by conformity.

Again, in a constitutional point of view, it is surely a serious consideration, that a great class of the community have their liberties and properties dependent on a yearly charter which may fall through, not by the united will of the legislature, but by the will of any one branch of it; nay, by the caprice or forgetfulness of a minister in moving or drawing up the annual act.

Dissenters object also to these provisions, that they are founded on an establishment and annual recognition of the principle of their exclusion; that they are concessions to the convenience of the community, not to *their* feelings or interests; that they are only palliatives of the evils which society would suffer, if the Test Laws were left in their proper deformity. The principle of proscription is maintained; and it operates directly and indirectly, in daily practice, to keep them out of stations which they would otherwise fill, or to which they might at any rate aspire. It separates them into a distinct class, and gives a sanction to the party spirit which rejoices in putting insults upon them; it gives the tone to that feeling which, in many corporations even of a liberal character, prevents Dissenters, though distinguished by talents and property, from any chance of participating in public honors. A remarkable instance was pointed out lately with regard to the wealthy, liberal, and public-spirited town of Liverpool, where, although the Dissenters are so important a body, that from one sect alone petitions were

presented to the House bearing signatures of persons possessed of three millions of property, yet, though no one would dream of enforcing the Corporation Act, the spirit and indirect operation which it produced had, for fifty years, prevented a single Dissenter from being a member of the corporation.

England is the only country which has ever sought to make the holiest ordinance of religion a passport to office; and it is obvious, that if the religious feeling of the party is looked to as the safeguard, it would be better to operate upon it directly, by imposing an explicit oath against the act or practice from which the State apprehends danger. Experience shows, too, that proscriptions of other sects are not necessary to ecclesiastical establishments: a rich endowment seems quite sufficient weight to throw into the scale in their favour. Even the justice of the burthen which such an *endowment* imposes upon the community, where many are of a different faith from the establishment, has been questioned; but the defenders of an establishment go far to seal its condemnation, when they maintain that political *proscription* is also necessary to its preservation. It is obviously the policy of such defenders, to prove the consistency of an establishment with justice and equal rights to others; and every step gained in proving such consistency is a step towards the security of the institution they support. The church of Scotland maintains itself only by endowment, and that a meagre one. In Ireland no Corporation Act ever existed. There was no Test Act there till 1703, and it was repealed in 1780. An Irish Protestant Dissenter, however, on coming to England, becomes proscribed; and so does a member of the Scotch Establishment, with whom the anomaly is the more striking, because an Englishman in Scotland is eligible to all offices. Another curious feature of this legislation is, that Dissenters may exercise every where the functions of electors; and may, as members of Parliament, sit and make the laws which they are held unworthy to execute.

But the whole subject is one of absurdities and anomalies, and must soon be rectified, if it be only regarded in the light of an amendment of the form and character of an important branch of our penal code. It is surely sufficient to command investigation and attention, that a most important class of the community has the misfortune to be oppressed and annoyed by a spurious piece of legislation, which never contemplated the species of operation given to it by subsequent events; that Protestant Dissenters are proscribed under pretence of "*preventing dangers which may happen from Popish recusants*;" and that the remedy, such as it is, which qualifies the evil, is equally spurious and indirect; being neither in terms, apparent purport, nor actual historical design, intended to meet the case to which it is practically applied.

**ART. V.—ABOLITION OF THE CODE NAPOLEON
IN THE RHENISH PROVINCES.**

THE French codes were introduced into the provinces on the left bank of the Rhine at the period of their annexation to France, by virtue of the treaty of Luneville, concluded on the 9th of February, 1801. When the events of the year 1814 had separated the Rhenish provinces from France, and re-united them to Prussia, Bavaria, and the Grand Duchy of Hesse, a rumour was generally circulated, that it was the intention of the first of these powers to substitute the Prussian for the French judicial institutions, in that portion of the recovered territory which was allotted to Prussia. The inhabitants of these provinces, however, had lived long enough under the new system to be sensible of its advantages: they addressed remonstrances to the King of Prussia against any alteration of the existing laws; and the rumour of the intended substitution of the Prussian for the French codes gradually subsided.

The satisfaction which was felt throughout this portion of the Rhenish provinces at the supposed abandonment of the design for altering their judicial institutions was but of short duration; for it was soon after ascertained, that a commission had been appointed at Berlin, charged with the revision and entire re-modelling of the laws in all the provinces: and it was suspected that the object of the government, in creating this commission, was not so much to establish a new general code for the whole kingdom, as to assimilate the laws of the recently acquired provinces to those of the state to whose dominion they were transferred. Alarm and uneasiness universally prevailed, and a number of pamphlets appeared in which the question was discussed with considerable ability, and with an earnestness proportioned to the magnitude of the interests involved in the projected alteration of the existing system of jurisprudence.

M. de Fürth, judge of the court of Aix la Chapelle, a native of the Rhenish provinces, who had received his education in France, undertook the defence of the existing codes. The French laws, he contended, were established in the country; they had become national by an existence of nearly thirty years. It was always dangerous to tamper with an established system of jurisprudence; and, accordingly, the different states of Germany had uniformly respected existing judicial institutions, in provinces which the course of political events had subjected for a time to foreign domination. The public interest was directly opposed to any alteration of the existing codes; nor was the preservation of those codes in any degree inconsistent with, or derogatory to, the

national honour. They were generally approved by the people; they were beyond all doubt superior to the laws of Prussia, and ought, upon every principle of sound policy, to be respected by the Prussian government. The Romans were so far from disdaining to be taught by their enemies, that they boasted of the instruction in the art of war which they derived from their campaigns against Pyrrhus and the Carthaginians. Among the institutions which it was especially desirable to preserve, M. Fürth particularly specified the publicity of judicial proceedings, and the trial by jury; institutions which had their origin in Germany, though they were now almost unknown in that country, and which were rigidly proscribed by the Prussian laws.

Such were the arguments urged by M. de Fürth in support of the French codes. Shortly after the publication of this pamphlet, it was reported that the king had signed an ordinance, in the month of July, 1826, at the baths of Toeplitz, declaring that the Prussian codes should be introduced into the Rhenish provinces, with such modifications as might appear to be required by local circumstances. The report was at first generally discredited; when a pamphlet appeared, to which the name of the author, and the nature of the views which it supported, gave a character almost official. It was written by M. de Kampz, chief secretary in the department for the administration of the interior at Berlin.

M. de Kampz, after expressing strong disapprobation of the conduct of M. de Fürth, who, in his capacity of public functionary, ought to have abstained from attacking the measure of abolition which had been already decreed, directed his arguments chiefly against the publicity of judicial proceedings, and the institution of juries. The publicity of trials, he maintained, created delay in the conduct of judicial proceedings; affected the impartiality of the judges; and was especially objectionable, as it exposed the private affairs of individuals to the curiosity of the public. A public trial was an empty shew—a spectacle performed for the sake of the public: even in France it was regarded only as a species of amusement, calculated to gratify the curiosity of strangers. The inhabitants of the Rhenish provinces recollected with enthusiasm the system of jurisprudence under which they lived before the conquest; and whatever might be the defects of that system, they preferred it unequivocally to that which had been imposed upon them by the French. With respect to the institution of a jury, the author considered it as one of the new-fangled theories of the day: it was an affair of fashion, and he declared that he was not one of the amateurs who affected to be enamoured with this novelty. Shoemakers and tailors, he contended, were as incapable of forming a sound opinion of the nature of a criminal charge, and the legal questions connected with it, as judges and civilians were of making

boots and coats. It was absurd to throw upon tradesmen the duty of deciding in matters which were entirely out of their province; and a tailor could no more enter into the merits of a *corpus delicti*, than a judge could pronounce upon the legitimate conformation of a coat. Public criminal trials served no other purpose except that of gratifying the idle curiosity of women, or, what was worse, that of instructing rogues in the means of eluding public justice. The French system of jurisprudence was an ephemeral establishment, imposed by the conqueror for the purpose of separating the Rhenish provinces from the Germanic body; it was a revolutionary creation, which it had become expedient to expunge by a stroke of the pen. It favoured arbitrary arrests, and protracted detention; and it was impossible, under the forms of procedure adopted by the French code, to be assured of the justice of a sentence of acquittal or condemnation. M. de Kamptz announced it to be the intention of the King of Prussia, to restore to the provinces of the Rhine their ancient local laws, and, at the same time, to establish the uniformity of the general administration of justice between these provinces and the rest of the kingdom.

Some other Prussian functionaries, pretending to be desirous of preserving at least a part of the French judicial system, published pamphlets in which they recommended a middle course. A pamphlet of this description was published by M. Bessel, Deputy King's Attorney, at Coblenz. This writer expresses his decided hostility to the institution of juries, and to the publicity of judicial proceedings. In criminal trials he conceives that too much latitude is allowed to the parties accused, in respect to the conduct of the defence, and that too many obstacles are thrown in the way of the public accuser. These obstacles he is desirous of removing. The pleadings which take place at the hearing ought, in the opinion of M. Bessel, to be retained; but he thinks that none but the parties, and a small number of their friends, should be suffered to be present at these proceedings. He insists, however, on the propriety of the attendance of the whole bar on all these occasions. M. Bessel's favourite idea is, an entire re-organization of the proceedings before justices of the peace. He wishes to establish a court of conciliation, to be composed, not only of the justice of the peace, but of some of the principal inhabitants of each district; who are not to hold more than one sitting a month, in order to discourage litigation by the remote prospect which this scheme would hold out to suitors of bringing their disputes to a speedy termination. The maxim which inculcates the expediency of bringing lawsuits to a speedy conclusion, is thus injuriously inverted; and M. Bessel does not seem to have reflected that the same scheme, which may deter men from embarking in frivolous or vex-

ations suits, also affords the most effectual encouragement to wrong-doers, by withholding redress from those who are most clearly entitled to the protection of the laws. Many other ideas are broached in the pamphlet of M. Kampz, which are not immediately connected with the subject under our consideration.

Such were the discussions, and such the state of public feeling with regard to the introduction of the Prussian code into the provinces of the Rhine, when the states of those provinces were convoked at Dusseldorf. It is right to mention, that these states are not a legislative body; they have merely the power of giving a vote as counsellors, and the right of remonstrance. The deputies expected to receive a royal message, requiring their opinion on the advantages or inconveniences which might result from the maintenance or modification of the existing system of laws. No such course, however, was taken. The king's commissioner communicated to the states his majesty's declaration, ordaining that the French code of laws should be superseded by the Prussian code; with the exception of certain dispositions and enactments, which it was the intention of the government entirely to re-model, in order to establish one uniform system of jurisprudence throughout the kingdom. It was further stated, that the king reserved to the states the right of proposing such modifications of the Prussian code as might be called for by local circumstances, or the particular wants of the provinces; and of requiring the re-establishment of ancient customs, in all matters not provided for by the general laws of the kingdom.

It appears from this communication, that the commission appointed at Berlin to revise the judicial institutions of the provinces, have settled the question by a short and summary process. It was a much more simple proceeding to impose the Prussian system of jurisprudence on the Rhenish provinces, than to compose a new general code. It is said that, if the states had been consulted, a great number of deputies would have voted for the maintenance of the French laws; and it is generally believed, that the right of proposing modifications, reserved to them by the royal declaration, is a mere nominal concession, from which no practical advantage is likely to be derived.

There is but one opinion among enlightened men in Prussia, as to the imperfect state of the existing laws, and the necessity of a general revision of their system of jurisprudence. Why, then, introduce this system of jurisprudence, with all its defects, into a country which is satisfied with that which has been established and approved by the experience of thirty years? The inhabitants of the Rhenish provinces might be justly accused of folly, if they resisted the introduction of a new, uniform system of jurisprudence for the whole monarchy; but they cannot comprehend the grounds

upon which they are compelled to adopt a system which is acknowledged to be bad, and which has not been revised, or adapted to those sound principles of equity and justice upon which all rational codes of law should be founded. Some persons have ascribed this measure to the zeal of a certain party, to whom the alteration of the system of laws will furnish a plausible pretext for removing the native magistrates, on the ground of their imperfect acquaintance with the profundities of Prussian law, and of filling their places with Prussians. If the advisers of his Prussian majesty are incapable of being influenced by the motive which these persons impute to them, they may possibly have been induced to recommend the measure, which has created so much apprehension and anxiety in the Rhenish provinces, out of deference to the great name of their ancient legislator, Frederick the Second. But Frederick was himself no lawyer; and the lawyers of his time were incapable of rising above the knowledge of their age. They, accordingly, contented themselves with compiling a voluminous body of law, extracted from the Roman codes, to which some modern decisions were added; and the nature of their compilation was wholly inconsistent with the simplicity and precision which should characterize a good code of laws. They afterwards attempted to reform the great abuses which practitioners had introduced into the conduct of lawsuits; and, with this view, they drew up a new mode of procedure, which throws the duty of conducting the pleadings almost exclusively upon a judge appointed for that purpose. In endeavouring to remedy the possible delays, or bad faith, of an advocate chosen by the parties themselves, by the substitution of an officer who has no interest in the cause, they, in reality, introduced a far greater abuse than that which was proposed to be corrected; for the interests of parties have suffered more from the arbitrary and capricious proceedings of the judges appointed to conduct the pleadings, than from the misconduct of advocates. If any other proof were wanting, in addition to the admissions of all enlightened jurists, as to the defects and inconveniences of the Prussian system of jurisprudence, it might be found in the immense collection of orders in council, ministerial instructions, rescripts, modifications, and interpretations, which the state of this code has rendered necessary since its last republication in the years 1816 and 1817, and of which the number exceeds that of the articles of the code itself. The inhabitants of the Rhenish provinces are justified, therefore, in regarding the precipitate introduction of these laws as an arbitrary act of power, by which they are forced to make a retrograde movement, in order that they may be assimilated to other parts of the Prussian monarchy; which, if their condition be compared with that of the Rhenish provinces in respect to agriculture, commerce, industry, and the progress of

knowledge, will be found to be far below them in the scale of social improvement.

The people of these provinces have not entirely abandoned the hope, that the respectful remonstrances of the states will have the effect of convincing the King of Prussia that there is no foundation for the report of his ministers, that the public feeling is in favour of the ancient Prussian laws. Public opinion is decidedly opposed to any alteration of the French codes; and as the reservation made in the king's message, in favour of the states, leaves an opening which will justify any modification of the sweeping decree of substitution, the Prussian government will act wisely in respecting, at any rate, the fundamental principles of jurisprudence to which its Rhenish subjects are attached, by an experience of the practical benefits they have derived from them. These fundamental principles are the equality of civil rights, which is destroyed in Prussia by the privileges granted to certain classes; the independence of the judges, which is affected in Prussia by a subjugation to the hierarchy incompatible with liberty of conscience, and the free exercise of judicial functions; the publicity of trials—a natural consequence of which is an oral procedure. This publicity, which existed both in the time of the Romans, and in that of the ancient governors, was first abolished by the papal decretals towards the close of the thirteenth century. The Pope believed that the secrecy of judicial proceedings would furnish him with a more certain means of extirpating the heretics of Toulouse; and the civil tribunals adopted, in succession, an innovation which relieved them from public censure, by concealing the errors they were liable to commit, while the veil of mystery which enveloped their proceedings was calculated, in the eyes of the vulgar, to invest them with an air of greater importance. Another advantage which the Rhenish subjects of Prussia are particularly desirous of retaining, is the abolition of the inquisitorial civil procedure, which forms the basis of the Prussian code. Under this process, no individual is allowed to employ the means which he may consider best adapted to support his claims; the parties cannot fix upon the points of fact and of law which they may wish to form the subject of the suit; but the whole form of proceeding is subjected to the arbitrary decision of a single judge, who has the power of determining what points the parties shall be bound to try, and of directing, as it frequently happens, minute inquiries to be made into facts in which neither of the parties is in any way interested. This is an abuse of which the people of the Rhenish provinces have the strongest reason to deprecate the re-introduction.

But Prussia is not the only power which has endeavoured to deprive her provinces of the benefits of the French system of laws. The Grand Duke of Hesse has also manifested his intention of

substituting the Hessian for the French codes, in the Rhenish provinces re-annexed to his dominions; and certain colleges of advocates, which thought proper to make some observations on this subject, were severely censured. The Grand Duke submitted a bill for the re-organization of the judicial system to the chamber of deputies at Darmstadt; but the chamber rejected the measure by a majority of a single voice. This circumstance has produced a great sensation in the provinces, the inhabitants of which seem to be strongly attached to the French code.

While the cabinets of Berlin and Darmstadt were occupied with preparations for a measure which has excited so much alarm and dissatisfaction in the Rhenish provinces, the government of Bavaria commissioned a learned magistrate to travel into Belgium and France, for the purpose of studying the judicial institutions of those countries. Such was the object of the mission of M. de Feuerbach, who has published the result of his observations in a curious work, under the title of 'Reflections upon the Publicity and Oral Conduct of Judicial Proceedings.' (a) The high character of the author, the originality of his views, and the many important considerations suggested by his 'Reflections,' deter us from attempting to give a hurried incidental analysis of the work. As we purpose devoting an article, in a future number, to its detailed examination, we shall at present merely remark, that the author sometimes approves, but more frequently condemns, the forms of proceeding in the French code. Whatever opinion we may feel ourselves bound to express upon the soundness of his conclusions, it is impossible for us to deny our tribute of admiration to the enlightened feeling and spirit of impartiality with which these researches have been undertaken and prosecuted. They are calculated to furnish an assurance that the present age is animated by a desire of improving social institutions, and of enabling men to acquire the greatest degree of happiness which can result from a system of jurisprudence conformable to the spirit of the times. It is well known that the art of surgery has, of late years, been indebted, for great improvement, to the advances which have been made in the science of *comparative anatomy*. The principle of improving our knowledge, by extending our researches into subjects analogous and collateral to the immediate object of our inquiries, may be successfully applied to the science of jurisprudence. We have arrived at an epoch when we should no longer hesitate to break down the absurd barriers opposed to the progress of knowledge, by prejudices erroneously called national. The people of different nations should mutually study and compare

(a) *Betrachtungen über die Oeffentlichkeit und Mündlichkeit der Gerechtkeitspflege*.—Giessen, 1821, 1825. 8vo.

existing institutions : and when the public opinion of each nation, enlightened by the efforts of philanthropic jurists, the founders of *comparative* jurisprudence, shall have obtained institutions adapted to the national manners, and the national wants, we may begin to hope that justice will be established upon firm and permanent foundations.

To complete this sketch of the state of jurisprudence in a part of Germany, we may observe, that the French codes, or at least the French civil codes, are still in force in the grand duchy of Baden, in the grand duchy of Oldenburgh, and in the principality of Saxe Cobourg. In many of the German universities, as in those of Friburgh, Bonn, Landshut, and Heidelberg, professors have been appointed, by whom the French system of law is regularly taught ; so that, although the French may have seen their judicial institutions banished from some countries, on which they had imposed them by the force of arms, it is possible that a nobler triumph is reserved for them. The inhabitants of the banks of the Rhine are exhibiting, at this moment, the most unequivocal proofs of their attachment to these institutions ; and, while this testimony is borne to their merits in one of the most cultivated parts of Europe, the code Napoleon has traversed the ocean ; and is probably destined to accelerate the march of intelligence and civilization in the vast forests of Louisiana, and under the burning suns of Hayti.

ART. VI.—GAME LAWS.

Ask a farmer, whose property are the fowls in his poultry yard ; he has no difficulty in answering boldly that they are his own. He provided a fit place in which they might be hatched and reared without disturbance, and he has since supplied them with food and with a place to roost in ; nor, if they should happen to stray into some neighbour's ground, would it ever occur to him that he had thereby lost his property in them. But why may not all this be said of the squire's pheasants ? The squire has bestowed ten times more labour and expense in hatching and rearing his pheasants, than the other has about his poultry : he has sown with buck-wheat extensive fields, where they may fare sumptuously every day ; and he has set apart spacious woods, where they may repose in security, while armed keepers watch their slumbers. Now, suppose one of them was to fly over into a neighbour's wood, why should the squire's property be at once determined ? Why should he not have as good a claim to his pheasants as the other to his poultry ? We apprehend, after all that has been said and written on this subject, the

real, and the only solid distinction is this,—that the farmer knows his poultry, but the squire does not know his pheasants. The one can point to a particular fowl, and say, I have reared and fed that fowl, and therefore have a right of property in it. The other can go no further than to say, that he has reared and fed many pheasants; but whether the pheasant sitting upon that tree be one of them or not, he cannot determine; any right of property, therefore, which he might have had, is too uncertain to be exercised; and a right which cannot be exercised is virtually no right at all. This very simple view of the subject will, we apprehend, solve many of the intricacies in which it has been involved, and shew that wild animals cannot, generally speaking, be the absolute property of any subject, in respect of the uncertainty of the person who would have a right to claim them. By the term absolute property, we mean property which will remain in the owner or those claiming under him, as long as the animal itself shall exist.

But the law does allow a man to have in these animals a qualified property, as it is usually called, that is, a property, perfect indeed so long as it lasts, but which may be determined by an alteration in the state of the animal, without any act of its owner; as for instance, I have a property in birds hatched on my lands so long as they remain unable to fly; which will cease when they are fledged. I have a property in a wild animal which I have tamed, which will cease whenever it shall escape from me, and return to its wild haunts and habits. I have, according to some writers, a property in wild animals confined on my land by an enclosure, which property will cease whenever the enclosure shall have been removed; or the animals escape beyond it. (Bacon's Abridgment, tit. Game.) So that we may lay it down, that whenever the law can ascertain with certainty the person in whom the right of property is vested, it allows that right to be asserted. Before we quit this part of the subject we should mention one curious exception to the general rule that no one can have an absolute property in wild animals; which exception will serve as another instance to show that the rule ceases whenever the reason for it ceases. If a swan not marked escape from its owner and be found in an open navigable river, he loses his property in it; but if it be marked he does not: a point of law pretty well understood in the olden time, and still kept in memory by the annual "swan hopping" expedition of the Lord Mayor of London. This last instance is mentioned merely by way of illustration, the property of swans differing in some particulars from that of any other fowl, in respect of their being royal birds, and even the privilege of marking them at all being confined to those who have the royal authority to do so.

However, it is no sooner settled that an absolute property in

Game cannot be vested in a subject, than the man of prerogative steps in and claims it for the King. His claim, when stripped of certain Latin phrases, in which it is pretty generally clothed, amounts in plain terms to this—that the King is intitled to all goods, in which no one else has a property: a claim which none even of the most arbitrary of our sovereigns have ever asserted. There is much curious learning in our old law books on this very question, what goods shall become the property of the Crown, supposing no owner of them to be known, and what shall not; a question which could never have arisen if this claim were good to its full extent. “If all wild animals had belonged to the Crown,” as Professor Christian rightly observes, “it would have been superfluous to have specified whales, sturgeons, and swans.”—Note to Blackstone’s Com. 2nd vol., p. 419.

It is not necessary to say more upon this part of the subject: should the reader wish to pursue it further he will find it ably illustrated in the late Professor Christian’s Treatise on the Game Laws, chap. 2.

If, then, wild animals have no owner, it follows that they will belong to the first person who shall have the luck or the skill to reduce them into his possession; and that all have an equal right to obtain them. And this right we apprehend the law of England at this moment recognizes, except as far as it is abridged, as indeed it is very materially, by the statutes which relate to qualification and certificate. The statutes of qualification, or, more properly, of disqualification, seeing that they confer a right upon nobody, but take one away from a very large proportion of the community, prohibit all persons, except those of a given rank or estate, from pursuing or killing particular animals. The earliest of them, which was passed in the 13th year of Richard II, and is still in force, fixed the qualification to kill “hares, conies, and other gentlemen’s game,” at 40s. a year, on pain of one year’s imprisonment. The latest, 22 and 23 Car. 2, c. 25, reciting that “divers disorderly persons, laying aside their lawful trades and employments, do betake themselves to the stealing, taking, and killing of conies, hares, pheasants, partridges, and other Game, intended to be preserved by former laws, with guns, dogs, trammels, &c. and other engines,” disqualifies all persons except those who have lands and tenements, or some other estate of inheritance of 100*l.* per annum, or a life or a leasehold estate of 99 years, or upwards of 150*l.* per annum, and except the son and heir apparent of an esquire or other person of higher degree, and the owners of forests, &c. from having, keeping, or using, any guns, &c. or other engines aforesaid. This last statute confines itself to declaring who shall be qualified to sport, without imposing any penalty upon the breach of the enactment. The 5 Anne, c. 14, imposes a fine of 5*l.* upon conviction

before a Justice, without, however, repealing the 13 Richard II: so that a person having 40s. a year, if he kill game, is liable to forfeit 5l.; a person having 39s. to be imprisoned for a year. The 8 Geo. 1, c. 19, allows all pecuniary penalties to be recovered at the option of the prosecutor, by the process of a civil action or information, instead of a summary conviction.

Supposing a man to be qualified by rank or estate to kill Game, he must now also annually take out a certificate upon a given stamp, which at present amounts to 3*l.* 13*s.* 6*d.* The 52 Geo. 3, c. 93, sched. L, makes it necessary to have a certificate to kill woodcocks, and some other animals which are not considered as strictly Game, and may therefore be killed by an unqualified man having a certificate.

The qualified man having taken out such certificate, is generally entitled to pursue and kill Game on lands in his own occupation, or, with the license of the occupiers, on any other lands. But without such license, no man generally speaking, not even the lord of a manor, can justify sporting over the ground of another. There is a notable exception, however, to this rule in the case of a forest, chase, park, or warren, the owner of which has, within the limits thereof, the sole right of killing the Game, to the exclusion even of the owner and occupier of the soil. This franchise, which can be derived only from a royal grant, or from a prescription which supposes one, has led Sir W. Blackstone to believe that, the property of all Game being in the King, he has a right to enter upon the lands of any subject to take the Game, and consequently may delegate that right to another. We think we have already shewn that the opinion of the King having property in Game is without foundation. Neither do we think there is more ground for supposing that the King can enter generally upon the lands of his subjects in pursuit of Game. The foundation of this right is laid by Sir W. Blackstone upon the principle of the feudal law, that the King is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord or lord paramount of the fee; and that, therefore, he has the right of the universal soil, to enter thereon, and to chase and take such creatures at his pleasure. Comment. vol. ii, p. 415.

To this there is a ready answer, that by the feudal law the ultimate proprietor, so long as the fee remained unforfeited, had no right of entering upon the tenant, or disturbing his occupation; and, as Professor Christian observes, "from the King's right to the universal soil, it is not evident why he should have a better right to take such creatures than to take any other production of that soil." And if the King have no right to kill the Game concurrently with the occupier, still less pretence can he have to exclude him, and least of all to delegate such power to

a subject. If it be asked, How then do we account for the existence of these franchises? the answer seems not difficult. Although the King had no right to enter upon lands which had already been granted out to a tenant, yet he was undoubtedly considered to be the proprietor of all such lands as were still unoccupied, and could either retain them as his own demesnes, or grant them out upon such tenure as he pleased. Accordingly, we find that our early sovereigns retained for themselves large tracts of such land as was uncleared, and of course unoccupied, for their own princely recreation of hunting. These tracts of land, however extensive, must, from the nature of the beasts they were mainly intended to shelter, have been as unproductive as a modern fox-cover. It is true that some of the Norman princes, not satisfied with the ample territories thus set apart for their diversion, did not scruple to enlarge them by the addition of districts already cultivated: but this tyrannical exercise of power, by proving so much more than is necessary for the argument with which we are combating, in fact proves nothing. It affords a precedent not merely for excluding the tenant of the land from the right of killing Game, but for driving him from his home, pulling down his house, laying waste his fields, and, in short, turning a country, cheered by the dwellings of man and enriched by his labour, into a howling wilderness. Nor do we remember that this royal devastation was ever referred, even by crown lawyers, to any better principle than the power of inflicting injuries with impunity; a power less pernicious in its example, and less vexatious even to those who suffer under it, than that which disguises itself under the robe of justice. Defect of argument, however, presents little obstacle to the sticklers for prerogative, even in the present day. In the good old times, *stei pro ratione voluntas* was almost an universal motto; and we therefore find that the *Charta de Foresta*, by which the royal prerogative of devastation was in some measure restrained, was wrested from the Crown, and maintained by the people, with little less difficulty than the more vaunted palladium of Runymede. These tracts, which were marked out by specified boundaries, were of four kinds, namely, forest, chase, park, and warren. Each of these was dedicated to the preservation of particular species of Game, and was put under the jurisdiction of particular officers, whose appointment derived its origin, as it necessarily must, from the Crown. It would be foreign to our present purpose to enter upon the characteristics which distinguished these franchises from each other: we shall, for the future, speak only of a warren, which is the lowest of them, promising, that whatever is said of a warren is intended, unless otherwise expressed, equally to apply to a forest, chase, and park. Many of them continue in the hands of the Crown, and are held by the King as his demesnes to this day. Many, as might be

expected, have been granted to subjects, the transfer being sometimes that of the whole soil, sometimes merely that of the right of killing the Game, leaving the property of the soil in the Crown, or in other grantees. As population increased, the lords, glad to sacrifice some portion of their recreation for more solid advantages, sold parts of the land for the purposes of agriculture. Besides, after the extinction of the larger and more ferocious animals, such as the wolf and the boar, there was less need of such extensive desolation; many of the animals being capable of being preserved as well in cultivated as in uncleared districts. The lord, however, on granting out the soil for the purposes of agriculture, and that not merely upon lease, but frequently to the tenant and his heirs after him for ever, still reserved to himself his free warren, or exclusive right of entering the lands to pursue and take the Game: a reservation just as equitable, as if one man should grant to another his field, reserving to himself a right of way or of common. We apprehend that this is the only legal foundation for any franchise of free warren; and that the title to the Game, if traced to its source, will always be found to have been once vested in the same person with the title to the soil. But if Sir W. Blackstone's doctrine be true, the Crown has, at this moment, the power of granting to a subject the right of sporting over the lands of another, to the exclusion of the owner; a power not only unfounded in law, as we think we have shewn, but of which the most arbitrary times, we believe, afford no precedent. On the contrary, Lord Coke tells us that Henry 8, who certainly, as he says, "did stand as much upon his prerogative as any king of England ever did," endeavoured to make a forest for himself about his house at Hampton Court; but found "that he could not erect either forest or chase over other men's grounds without their consents," and was obliged to obtain the consent of the freeholders and customary tenants for that purpose, 4 Inst. 401. It is true, that no man may create a warren, even on his own lands, without a grant from the Crown; but it must be remembered, that the creation of a warren implies the formal appointment of officers to guard it; which appointment, it must be confessed, no subject has a right to make. And we shall find, on consulting the old Reports, that, when any private person has thus taken upon himself illegally to set up a warren, the offence has been considered to consist, not in taking of the Game, but in the creation of such offices; and that the remedy has been by *Quo Warranto*, a writ exclusively applied to those who have taken upon themselves offices with which the Crown has not invested them. Having thus disposed of the franchise of free warren, we shall, for the future, be understood to speak of lands where no such franchise exists, and of the occupier of such lands, who has a due qualification and certificate.

And we think we have shown that the occupier has the undoubted right, and that not by usurpation or connivance, but by the strict law of the land, to pursue and kill the Game on his own land. An interesting doctrine this to the landowner who is a shooter: but another question suggests itself of as much importance to him if he be a fox-hunter,—Has he a right, in any case, to do so, without leave, on the land of another? It must be owned that, by the common law, every one who started a noxious animal had a right to pursue it over the lands of another; a right which, before King Edgar's days, was probably not often disputed; as a man who saw a wolf on his farm would not be apt very captiously to scrutinize the right of pursuing it, and would be better pleased with the aid of a hunter with a stout heart and a strong arm, than if he bore even the most respectable parliamentary qualification. But the age of wolves is gone, and the age of foxes has succeeded. The fox, like the wolf, is, in the language of the law, "a noxious animal, accustomed to do mischief;" and, accordingly, our modern country gentlemen are often to be seen following the smaller beast of prey with at least as well appointed a train, and as destructive intentions, as their ancestors ever displayed in the pursuit of the larger. Only the same courtesy and humanity which has, in modern days, lessened the horrors of war, has also considerably softened the rigours of hunting. The war between the ancients and the wolves was a war of barbarous extermination, in which no quarter was given on either side. The war between the moderns and the foxes is confined to slaughter in the open field, and is never marked by clandestine assassination: so that the breed of the foxes is not yet quite extinct, like that of the wolves, but there are still many left in the island: although great pains are taken for their destruction, and kennels of fleet and strong dogs are in various places maintained for their pursuit; the situation of such kennels being usually selected with such singular care and judgment, that a correspondent informs us, that whenever he has found any considerable number of foxes, he has rarely failed to find a kennel of hounds somewhere in the neighbourhood; without which provision, he concludes, the whole country might be in danger of being overrun by them. Upon such grounds stands the right of fox-hunting. Lord Ellenborough, indeed, in a case of trespass brought against a person for entering the plaintiff's land in pursuing a fox, is reported to have directed the jury "to find for the plaintiff, if they thought, from the evidence, that the defendant pursued the fox for his own pleasure and amusement, and if they thought the good of the public was not his sole governing motive." *Lord Essex v. Capel*, Christian's Game Laws, 114. But, with all the deference due to so great a lawyer, who, it should be observed, was no fox-hunter himself, we cannot understand how, if it be a duty to kill a fox, a man can subject himself to an action merely by performing

his duty with alacrity. But the pursuing of a noxious animal is the only instance in which an entry on the land of another is justifiable under the Game Laws, except in the case of free warren. It has, indeed, been sometimes supposed that, if I start Game on my own soil, I may follow it into my neighbour's; but we apprehend that the decisions from which this notion takes its rise are to be referred only to the right of keeping Game when killed, and not of entering another's soil. We will give an instance precisely in point from Manwood, p. 389, where it is said, "If I find a pheasant in my lands, and I let my hawk fly, I may follow the flight into another man's land by reason of the first property which I had in the pheasant *ratione soli*; and if my hawk kill the pheasant in another man's land, I may enter and take it, by reason of that property and pursuit; and, in that case, I shall not be punished as a trespasser for taking and carrying away the pheasant, but only for entering the ground." And it has been expressly decided that such entry is unlawful in *Deane v. Clayton*, 7 Taunt. 533.

Supposing, however, our qualified sportsman to pursue his game over my land without my licence, what is my remedy? The ordinary remedy which the laws point out is, the action of trespass, in which I may recover the amount of any damage actually done; but as the damages in these cases are generally merely nominal, it becomes material to consider in what cases I shall recover my costs though the damages be under 40s. The general rule, which we need not here dilate on, is, that in this case the plaintiff shall recover no more costs than damages. An exception is made to this rule by 8 & 9 Will. 3, c. 11, which provides, that if the judge shall certify that the trespass was wilful and malicious the plaintiff shall recover his full costs; and the judges have, we believe, considered themselves as bound to grant this certificate, when a trespass has been committed in pursuit of Game after notice (a).

(a) The reader who is not aware of this distinction may have been startled by a case in which the Prince Leopold of Saxe Coburg, to whom the deputation of a manor had been gratuitously granted by the Corporation of Kingston, was the real plaintiff. The Jury having returned a verdict of one shilling damages, the Judge (Mr. Serjeant Onslow) said, with some warmth, "Then I shall certify." This action serves well to elucidate the absurdity of the law,—the nominal plaintiff seeking compensation for damage to his soil, is supposed to have suffered to the extent of one shilling, but the defend-

ant is mulcted some fifty or one hundred pounds, under the pretence of costs for having shot a partridge, to which the owner of the soil had no legal right, and the Prince Leopold could only pretend under the fiction of being gamekeeper to the Corporation of Kingston. In a case of *Drummond v. Frazer*, sittings after Trinity Term, 1827, for trespass in hunting after notice, Lord Tenterden, C. J., refused to certify; it appearing that the defendant had leave to hunt on grounds adjoining, and not having any intention of coming on the plaintiff's land.

Such is my remedy by action against a qualified trespasser: should he be unqualified, I may either proceed against him for the penalties under the statutes above mentioned, or I may bring my action of trespass, in which I may recover full costs, with a judge's certificate; and, in some cases, (that is, if the defendant be an "inferior tradesman, apprentice, or other dissolute person,") without it, *vid.* 4 & 5 W. & M. c. 23.

The law has also armed the officers of forests, chases, parks, and warrens with large powers with respect to the apprehension of offenders; which, though obsolete in practice, still, we believe, remain: we cite one by way of example, 21 Ed. 1, sched. 2—"If any warrener shall find any trespassers wandering within his liberty, intending to do damage therein, and that will not yield themselves after hue and cry made to stand unto the peace, but do flee or defend themselves; although the warrener or his assistant do kill such offenders, they shall not be troubled upon the same."

The right I may have of setting spring-guns and other destructive engines, to prevent trespasses on my lands, need not be dilated on; as, probably, the legislature will have disposed of that subject by the time this article will be in the reader's hands.

Here it may be proper to advert shortly to the question, Whose property is game, thus killed on my land, without my licence? And the rule laid down in the case of *Sutton v. Moody*, Lord Raymond's Reports, p. 251, is as follows:—"If A. starts a hare in the grounds of B., and hunts it, and kills it there, the property continues all the while in B. But if A. starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A. the hunter; but A. is liable to an action of trespass, for hunting in the grounds as well of B. as of C." But these two propositions can scarcely be both true. Suppose the first to be true, what is the reason of it? The grounds of B. are not supposed to be inclosed, so that the hare may perhaps have entered thereon the moment before. B. must therefore have the property merely by the possession; and when did that possession commence? There seems no way of answering this, but by saying that the possession commenced, and that B. thereby acquired a property, the moment the hare came upon B.'s land. Why then, in the second case, does not C. acquire a property the moment the hare comes upon his land? Since then these two propositions are inconsistent with each other, and the first seems contrary to the principles laid down in our books, and supported, as we believe, by no subsequent decision; while the second agrees with the general doctrine, that game is the property of the taker; and it is also confirmed by a later determination (*vide Churchward v. Studdy*, 14 East, 249), we shall, perhaps, feel disposed to doubt the truth of the first; and lawyers generally must have doubted it, or they might always have

got rid of the difficulty respecting the costs in trespass upon land, by bringing an action for the Game itself, wherever it has been both started and killed on the plaintiff's land. We again remind the reader, that we are speaking of land not subject to free warren.

Upon these grounds stands the general right of pursuing and killing Game; but it should be observed, that it is made penal, by several statutes, for any one but a qualified person, or one claiming under a qualified person, to have game in his possession. The statute 5 Ann. c. 14, prohibits any higlar, chapman, carrier, innkeeper, victualler, or ale-house-keeper, from having in his possession, or buying, selling, or offering to sell any hare, &c. under a penalty of 5*l*. Then the 9 Ann. c. 25, sec. 1, prohibits all unqualified persons from selling, or exposing to sale, any hare &c. under the same penalties as are by 5 Ann. inflicted upon higlars, &c.; and by sec. 2, if any hare, &c. be found in the possession of an unqualified person, the same shall be deemed an exposing thereof to sale. Both these Acts make an exception in favour of one claiming under a qualified person. But, not to mention some earlier statutes, the 28 Geo. 2, c. 12, prohibits even qualified persons from selling Game; and 58 Geo. 3, c. 75, makes it penal to buy Game even from one qualified. And by 4 and 5 W. and M. c. 23, search may be made, as in case of stolen goods, by a constable, with a justice's warrant, in the house of any suspected persons not qualified.

We have hitherto confined ourselves to such privileges (with the exception of entering on the lands of another, and of the selling of Game) as the qualified man has, though the unqualified man has not. But there are also various statutes for the protection of Game, which apply equally to all persons, whether qualified or not. We mean the statutes against poaching or taking Game unfairly, with reference either to the manner of doing it, or the season of the year, or hour of the day, in which it is done. With respect to the manner of taking Game, the 2 Jac. 1, c. 27, prohibits shooting Game with a gun, or tracing hares in the snow, or taking them with hare-pipes: it seems to have been thought necessary to pass the 48 Geo. 3, c. 93, expressly to allow shooting hares with a gun: as this last Act does not mention any other kind of Game, we presume it was thought that the provisions of 2 Jac. 1, concerning other Game, &c. were virtually repealed by the later qualification acts: whether it be still penal to trace a hare in the snow, seems to be uncertain. The seasons of the year, within which particular kinds of game may not be killed, are so well known, that it is unnecessary particularly to mention them. The 2 Geo. 3, c. 19, which regulates the matter as to pheasants and partridges, limits the same day for killing them and having them

in possession; so that those killed on the last day ought to be eaten the same day, which, as the birds are then old and somewhat tough, is inconvenient. We have heard it said that sportsmen seldom eat Game, a remark which this statute may perhaps serve to corroborate. Killing particular species of Game, on Sunday or Christmas-day, is also prohibited by 13 Geo. 3, c. 80. But the last, and by far the most important branch of the law, relates to the taking Game at night. The 9 Ann. c. 25, sec. 3, prohibits the taking, killing or destroying, any hare, pheasant, partridge, moor, heath, game or grouse, in the night-time, under penalty of 5*l*. The 13 Geo. 3, c. 80, increases the penalty for the first offence to 10*l*. at the least; for the second, 20*l*. at the least, by summary conviction; for the third, to 50*l*.—(the proceeding being by indictment)—or, in default of payment of the 50*l*., to six months' imprisonment at the least; and, if the justices think proper, public whipping. There are provisions against taking rabbits in the night by 3 Jac. 1, c. 13, and 22 and 23 Car. 2, c. 25; but more particularly by 5 Geo. 3, c. 14, which makes the offender liable "to be transported for seven years; or suffer some less punishment by fine, whipping, or imprisonment, in the discretion of the Court." These statutes apply to the taking of Game in the night, whether by nets, or any other engines: but as it was found, that persons engaged in such illegal practices frequently carried arms with them to protect themselves against gamekeepers or others who might be on the watch to oppose them, the 57 Geo. 3, c. 90, was passed, which, after reciting that "as idle and disorderly persons frequently go armed, in the night-time, for the purpose of protecting themselves, and aiding, and abetting, and assisting each other in the illegal destruction of Game or rabbits; and whereas such practices are found by experience to lead to the commission of felonies and murders, for the more effectual suppression thereof," enacts—"That if any person or persons having entered into any forest, chase, park, wood, plantation, close, or other open or inclosed ground, with the intent illegally to destroy, take, or kill, Game or rabbits; or with the intent to aid, abet, and assist any person or persons illegally to destroy, take, or kill, Game or rabbits, shall be found at night, (it here specifies the hours), armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, every such person so offending, being thereof lawfully convicted, shall be adjudged guilty of a misdemeanor, and shall be sentenced to transportation for seven years, or shall receive such other punishment as may by law be inflicted on persons guilty of misdemeanor; and as the Court, before which such offenders may be tried and convicted, shall adjudge."

If persons so engaged should be disguised as well as armed, it would have been a capital felony under the Black Act, 9 Geo. 1,

c. 22; but as Clergy is restored to offences under the Black Act, by 4 Geo. 4, c. 54, the penalty attached to it would not now be materially greater than that imposed by 57 Geo. 3, c. 90.

Thus we have endeavoured to give a general view of the state of the law as it stands at present with respect to game: we should however observe, that besides those wild animals which are not mentioned in any of the statutes which we have quoted, and the right to take which must therefore depend on the general principles which we touched upon in the outset, there are some particular provisions with respect to hawks, swans, pigeons, and herons; for which, we refer the curious reader to the legal writers on the subject. We have also omitted to mention those statutes which particularly apply to deer, for reasons which we shall mention hereafter: for the appointment and powers of gamekeepers, as well as the officers of forests, chases, parks, and warrens, we also refer the reader to those who have written more at large on the Game Laws.

We now proceed, in the second place, to examine the efficacy and justice of these laws; and we believe that no one will be able to take even the cursory glance over them, which this short and imperfect article is calculated to afford, without perceiving that there is much in them which is unfit for any times, and much more that is unfit for our own times; that there are some statutes which might well be consolidated, and many more which require to be repealed. We shall divide this second branch of our subject into the same number of heads as the first, and consider them in the same order. And first of the property in Game.

We here meet with a preliminary difficulty, that of knowing what the legal definition of Game is. In the extensive signification of the term, all wild animals which afford sport to their pursuers may be called Game: but we have seen that there are many animals which afford sport to their pursuers, which our law allows to be killed by persons whom it considers as not qualified to kill Game. Again, if it be said that those animals are Game, to which the statute law has extended its protection, that is not true; for rabbits, though actually mentioned as Game in the earliest qualification act, are not considered as Game. How much uncertainty would be remedied by a short definitive clause, enacting, that whenever Game is mentioned in this or any future statute, such animals, enumerating them, shall, unless it be otherwise expressed, be understood by that term! Supposing this difficulty thus disposed of, as it easily may be, we come to the consideration of the question, whether it would be expedient to make any legislative provision respecting the property in Game. It has been proposed by many, who have seen the evil consequences of the present regulations concerning the selling of game, to "*make game*

property;" for that is the current expression. Though we are strenuous advocates for change where it is necessary, we think it should always be avoided where it is not necessary, as being almost invariably attended by some degree of uncertainty and litigation. And we think all the good effects which are anticipated from this measure would be better answered, by merely repealing the statutes which prohibit the buying and selling of Game, and leaving the property of Game where it is.

We have shown that by our law no one is capable of having an absolute property in game; and it seems too that this incapacity, since it is not imposed by arbitrary provisions, but results from the nature of things, cannot be removed by the legislature.

But the qualified property which our law does in some cases recognize, coupled with the undoubted right which every man has to full redress for intrusion on his lands, and perhaps some additional facility given to this redress, would, we think, supersede the necessity of making any alteration.

Still, we cannot say that a law, that wild animals shall be the property of him, upon or above whose land they shall be for the time being would involve either injustice or absurdity. The Civil Code of France, though it makes no general provision concerning Game, which it leaves to be regulated by particular laws, yet declares that things, which the owner of the soil has placed upon it for the service and use of such soil, shall be immoveable by destination; and it specifies among other property, rabbits, pigeons, and fish.—Art. 524.—And perhaps, we should think, there would be no objection in these days, to the putting deer in inclosed parks adjacent to dwelling-houses, upon the footing of other tame and domestic animals; since their size, the variety of their marks, and the frequent opportunities of observing them in such parks, makes it tolerably easy to identify them: besides, they are now considered more as an article of value, and less as an object of sport; and, therefore, we have thought they ought not to be included in those remarks which we apply to Game in general.

But though we think thus favourably of the present laws, as far as they regulate property in Game, our opinion is very different of them, as far as they require a qualification to kill it. Every man is qualified to eat pine-apples; that is, when he can get them. Does any evil result from this? Would a man be listened to, who should propose to limit the right of eating pine-apples to those who have 100*l.* a year in lands and tenements? And, yet, what better reason is there for imposing such a limitation on the right to kill Game? We never heard one which had any weight: let us discuss those we have heard. The reasons which Sir W. Blackstone gives for this limitation are four:—

1st. "For the encouragement of agriculture and improvement

of lands, by giving every man an exclusive dominion over his own soil."

A conclusive reason enough against giving a general license to all persons to pursue Game over their neighbour's lands; but, by allowing a man to sport on his own lands, you grant him an amusement which he will take care shall not interfere with their improvement; and you leave his dominion over his own soil as exclusive, and more complete, than it was before.

2d. "For preservation of the several species of those animals, which would soon be extirpated by general liberty."

No doubt a general liberty would lead to their extirpation; but let this liberty be restricted to the limits of each man's own soil, and you take the most effectual way of preventing their extirpation, by interesting those who best know their habits and their haunts in preserving them.

3d. "For prevention of idleness and dissipation in husbandmen, artificers, and others of lower rank, which would be the unavoidable consequence of universal license."

These consequences are obviated at once, if none be allowed to sport except on his own land; the great mass of husbandmen, artificers, and others of lower rank, having no land, and, therefore, no means of indulging in this particular kind of idleness and dissipation.

4th. "For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people: which last is a reason oftener meant than avowed by the makers of Forest and Game Laws."

Whether this be historically true or not, it cannot apply to this country, where the Game Laws have not the effect of disarming the people, who may keep what weapons they please, so that they do not use them for the destruction of Game. If so acute a writer as Blackstone saw no medium between restricting all below a certain degree from sporting, even on their own soil, and granting an "universal license" to every one to sport where he may choose, it is less wonderful that persons, less accustomed to think and to reason, should have adopted the same fallacy. When you propose to repeal the qualification acts, you are thought, by many, to recommend the granting of a kind of universal free-warren over the whole soil of the kingdom. Now, we do propose the repeal of the qualification acts; but we propose, also, to leave to every man the exclusive dominion over his own soil: we propose to found the protection of Game, not on a privilege which favors one class to the exclusion of the rest, but on that right of property which embraces every member of a civilized community: we propose to expunge the useless and odious code of feudal barbarism, and to replace it by the simple proposition of the Roman law, *Qui alienum*

fundum ingreditur venandi aut aucupandi gratiâ, potest a domino prohiberi ne ingrediatur."

For this purpose, no new powers need be granted to the occupier of the land, who, as we have seen, may bring his action against any person who disturbs his possession: perhaps, however, if the qualification acts were repealed, it would be necessary also to allow the plaintiff, in these actions, to recover his costs for a trespass, even without notice, unless the defendant could show that he had some ground for believing, that he had a right to come upon the land in question. Perhaps such actions might be allowed to be tried in the county courts, which, we believe, are soon to be established. Even if a summary conviction were to be allowed, of which we should much disapprove wherever a decision by jury could be obtained, there would be no additional hardship, if, in retaining the same process, and the same penalties, you made the offence to consist in the entry on another's soil in quest of Game, rather than in the using a gun or dog without being qualified. It was proposed by Lord Wharncliffe's late bill, to give to the occupier a power of at once apprehending a trespasser; but, when we consider the frame of mind in which such apprehension would generally be attempted, and the contests to which it would lead, and those generally between parties armed with deadly weapons, we cannot but think, with Lord Eldon (b), that such a clause would be in the highest degree objectionable.

We are so thoroughly persuaded of the injustice and absurdity of the principle of all qualification acts, that we should be rather sorry to see them made less obscure, and more fit for modern times; and, therefore, feel little disposition to apply ourselves to the pointing out their particular defects: no one, however, can avoid observing the absurdity of allowing the son to be qualified in right of his father, when the father himself is not qualified; of confining, in these times and in this country, the qualification to landed property; or, of bringing to bear on the offender the cumbrous artillery of three different statutes—one requiring the qualification,

(b) When we, however, contrast this argument of the noble Lord's, with his speech on the Spring-Guns' Bill, we can scarcely believe that the same senator could have uttered both. When his Lordship told his good-humoured story of the trespassers on his own estate, he should have fancied, that instead of himself there had been a spring-gun in the field to argue the law; that instead of an invitation to dinner with the Lord High Chancel-

lor! a coroner's inquest had been the result of a mistaken notion on the law of trespass, would his Lordship have justified the placing an unreasoning and deadly instrument as the guardian of his Game, instead of a rational and possibly humane keeper? we are sure that he would not; and, yet, he would have reserved to others the right of doing an evil which he would shrink from committing himself.

a second imposing a penalty for sporting without it, and a third allowing an action to be brought for the penalty. We hope that the bill, which is now going through the House, to regulate the qualification, will amend these defects; but we hope, much more, that the discussion of the subject will lead thinking men to ask themselves, where is the need of requiring any qualification at all.

The right of insisting on a certificate, or, in other words, of imposing a tax (c) on the amusement of sporting, stands on perfectly different grounds, and seems as equitable a tax as can be devised: nor would a complaint at paying for the fowls of the air come with much consistency from a people who pay so cheerfully for the light of heaven.

Of the right of pursuing Game, little need be added to what has been already incidentally remarked.

The grievances which arose from the establishment of forests, chases, parks, and warrens, are happily known to us only from history. There are powers granted to the officers of these franchises by these statutes, which probably remain unrepealed only because they are unknown, and which ought to be abolished. As we think, however, that the existence of these franchises may be traced to a legal source, and that they cannot be considered as burthensome to those who have purchased or inherited lands which have from time immemorial been known to be subject to them, we should be sorry to see the legislature abolish them expressly: private property ought never to be sacrificed, except to gain a clear public good. All the grievances connected with them would be fully remedied by repealing the statutes relating to them, and placing their officers on the footing of other gamekeepers. We will take this occasion to remark, that though, by repealing the qualification acts, we should at once give every occupier of land a right of sporting, yet this right might always be given up by his own consent in favour of the landlord, who might reserve to himself the exclusive right of killing Game. So that, allowing the necessity of preserving the Game at all hazards, and admitting the paramount importance of the residence of the country gentlemen on their estates, the preservation of the

(c) A learned friend who can only shoot, and, then, not very well, for about ten days in the middle of Sept., would have us suggest that certificates, for a limited period, should be granted at a lower rate; and, he contends, that such a charge would be productive to the revenue.—“I never take out a certificate, because I think half-a-guinea a shot too dear for my sport; and Sir W. W., though

very strict as to his Game, would think it unreasonable to set his keepers at me: but I cannot say I am as comfortable as if I had my privilege in my pocket. I would give a guinea not to skulk when I see a *qui tam* face looking over the hedge; and, if the certificate cost no more, Sir W. would not let even a guest carry a gun on his estate without one.”

country being the incidental effect, while the destruction of the Game is the primary object of that residence; still, when we consider how often the landlord would thus exclude his tenant from sporting, and what immense tracts of land, in England, are vested in a few proprietors, any fears for the extirpation of Game, from taking away restrictions on qualification, are perfectly absurd.

On the subject of the sale of Game, we are relieved from our labour by observing, that this subject seems at last to be understood.

We heartily congratulate the people at large, that the country gentlemen seem to be at length convinced that, let them make what laws they will, aldermen, "tradesmen, and other dissolute persons," have eaten, are eating, and will eat, their hares, pheasants, and partridges. It must be so: all theory proved this, and all experience confirms it; so that they have no choice whether there shall be a trade in Game, but only whether that trade shall be carried on under the sanction of the law, or in spite of it.

Now we freely confess, that the hopes of those who think that, by legalizing the sale of Game you will put a stop to poaching, are much too sanguine: it is enough for us that we may reduce the offences, and their consequent crimes, to a tenth part of their present multitude and magnitude. A pheasant will always be worth eating; and, until some great change shall have taken place in the habits of our peasantry, there will be, in every village, one or two men who, in default of easier robbery, will be sufficiently pleased with this nocturnal sporting to be content with a very low profit upon the produce of it. If it then be asked, Why alter the law unless you can prove that benefit will be gained by the alteration? we shall take leave to answer that question by asking another,—Why fetter us with a vexatious exception to the general rule, that each may do what he pleases with his own, unless you can prove that such a restriction is compensated by an adequate advantage? Now, whether the prohibiting the sale of Game be attended with any advantage is, to say the least of it, doubtful. Do these prohibitions limit the supply of Game? It is abundantly proved that they do not. No one who has read the report of the Committee on this subject can doubt that every one who wants Game can get it. Do they limit the demand? We believe they do not, but this still remains to be tried; and we rejoice to observe that the legislature has determined to make the experiment.

This subject naturally leads us to another, which is intimately connected with it, and which begins to assume an importance hardly capable of exaggeration. We now appeal no longer to the lucubrations of lawyers, or the reflection of acute observers; but we defy you to find any one person of common sense among the

most inattentive spectators of what is passing around them, who has not seen the lamentable effects of our present Game Laws. These laws are filling our prisons, and loading our hulks. Not an assize passes that they do not consign many to transportation, and not a few to the gallows. During the last circuit game-keepers were convicted for *murdering* poachers, and several poachers of similar crime towards keepers and preservers. Is this a state of things which justifies us in sitting with our arms folded, and wishing poaching was less frequent? or does it not require every one, according to his means, by his voice, by his pen, by his influence, to inquire into and to explain the causes of this evil, and to endeavour to find and to enforce the remedy? Let us observe the progress, and that a natural one, which has brought things to this frightful pass. It is found that Game requires a protection, that is, a penalty upon the offence of taking it. Now this offence, compared with those crimes which violate the security of a man's dwelling, or deprive him of property useful to his subsistence, is evidently a slight one, and therefore a slight penalty is at first attached; sufficient, however, to repress that universal licence which complete impunity might have encouraged. So far all is well. It is however found that, in spite of a penalty adequate to the offence, the number of offenders continues the same. The squire says, "Let the penalty be doubled," and it is doubled. Still the offenders remain the same in number; and when seen by the game-keeper seem less to like being caught than they did before. This is very odd; and the squire infers from it, that if the penalty be trebled the offenders will be fewer, and more easy to apprehend. He gives notice of a bill to that effect on a given day. Unlucky the wight whom business or pleasure calls up to London on that day: the road is covered with rural legislators, drawn up by a spell more powerful than the Speaker's warrant. It is in vain that you prove that, where the temptations to commit a crime are strong, the mere increasing of the penalty has a greater tendency to increase the ferocity of the offenders than to lessen their number; in vain do you expose the wicked inhumanity of the principle—that property is to be protected by penal terrors in proportion to its insecurity, without reference to its value. Bentham and Beccaria they have never read. Mackintosh and Romilly they have never listened to. In vain do you refer to experience, the late but wholesome instructress of the unreflecting. Though the new statute be passed upon the same principle as the old, a contrary effect is anticipated. A diametrically opposite motion is expected to result from giving the machine a fresh and a stronger impulse on the same side. Well; *the country*, properly so called, decides the question, and the bill passes. Still the result is puzzling: the offenders, who have unhappily been weaned from lawful employ-

ment, do not reform, and will not starve ; neither does the aggravation of the penalty at all increase their docility in surrendering themselves up to it : on the contrary, they go forth in stronger bodies, armed and arrayed, and determined to stand by each other. It would be idle in the gamekeeper to attempt to do his duty, unless he has also his party as well armed, nerved with the same courage, and bound to each other by the same fidelity. And thus,

Blood hath bought blood, and blows have answered blows,
Strength matched with strength, and power confronted power.

Where is this atrocious system to stop ? If there be a point of severity which will have the effect of putting down the offence, it is evident that your laws have not reached that point : your system, unless abandoned, must be perfected ; and you can act with consistency only by increasing the penalty till the life of a pheasant and of a man shall be protected by the same sanctions. But if severity alone has not, and cannot, lessen the evil, retrace your steps, mitigate the severity of your laws, provide less for punishment, and more for prevention. And, having thus done your duty as legislators, stop not there : you have found that no good results from increasing the punishment of the offence ; try what good can be done by decreasing the temptation to commit it. Abandon the pernicious affection of feeding Game in such immense numbers as would make poachers where they did not find them ; be content to give up the lary ostentation of those battues which neutralize the knowledge, the activity, and the energy of the English sportsman. Think no pains ill bestowed, and even no condescension thrown away, which, by bringing you better acquainted with the habits of thinking of the peasantry, may give you opportunities of advancing their reformation : for this purpose encourage, without attempting to force, their industry ; promote, without affecting to regulate, their amusements. And when, as we fear will sometimes be the case, you shall find the minds of the old too much hardened by evil habits to be capable of receiving any kindlier or better impressions, the young, at least, are in your power, and may be moulded as you will. Be sure that they are of more value, even to you, than many pheasants : be sure, that if they once enter upon an education of dishonesty and violence, they will not fail to make a fearful progress in it. You now require armed men to guard your preserves :—may you never want them to protect your houses ! The war commenced in your woods may be ended in your chamber :—the ruffian you have made in vindicating the life of a pheasant may consummate his crimes in the destruction of your own.

ART. VII. THE DRAMATIC CENSORSHIP.

THE importance of bills submitted to the legislature is far from affording a test of the quantity of deliberative wisdom bestowed upon them ; for many laws, most materially affecting the rights and liberties of the people, have been passed with little or no discussion, and, in all probability, with no very accurate perception of their nature and tendency on the part of a great proportion of the law makers. Parliament frequently gives a passive, unreasoning assent to new laws ; but always manifests a jealous vigilance, when it is proposed to reduce the bulk of the statute-book, by the repeal of a frivolous, inoperative, or injurious enactment. Hence the evil inflicted by bad laws is much more easily created than cured ; and well-intentioned, but indolent legislators, whose co-operation in the business of legislation consists chiefly in the silent eloquence of their votes, will do well to reflect a little on the facility with which such laws are passed ; and to contrast that facility with the difficulty, if not the active opposition, with which any attempts to repeal or modify them are usually encountered. The flimsy pretexts under which measures, seriously encroaching upon public liberty, or upon the rights of particular classes of the community, have, at various times, received the sanction of the legislature, are calculated to excite astonishment and ridicule, when they are examined at a distance from the period, at which ministers, by the aid of temporary panics and prejudices, have been enabled to give them a colour of plausibility, and render them available to political purposes. Let the encroachment, however, be once established, and the portion of constitutional territory wrested from the people becomes so much sacred ground for the champions of existing institutions, which they are prepared to maintain against all future attempts to recover it. When Lord Castlereagh proposed to the House of Commons the Seditious Meetings' Bill, and other measures of coercion in 1817, he read to that assembly a number of extracts from an obscure pamphlet, written by a crazy mechanic named Spence, in which a project was broached for restoring the national prosperity, by an equal partition of the landed property of the kingdom. This book would probably never have been heard of beyond a very limited class of readers, if it had not thus been made one of the grounds for the introduction of measures imposing restraints upon the liberty of the people. In Lord Castlereagh's estimation, all books were, perhaps, equally important, or equally insignificant ; for his mind was so little tinged with literature, that men who had the best opportunities of watching his public career, have doubted whether he had ever voluntarily read any book of any description. It is not easy to determine, therefore, what degree of importance the minister

really attached to this paltry publication ; but if he felt the same contempt for it which he appears to have equally entertained for the noblest and the meanest productions of human intellect, he showed some practical sagacity, when he calculated upon turning it to account in his address to the representatives of the landed interest. The Spencean system struck terror into the hearts of the country-gentlemen. The hair of Sir Thomas Lethbridge, ever ready, upon the slightest provocation, to assume the perpendicular, took fright at an early period of the minister's recitation ; and, by the time the extracts were concluded, the squirearchy were fully prepared to acquiesce in any sacrifice of popular rights which the most reckless insensibility to the public interests could have suggested to them, as a security against the designs of the Spencean philanthropists. The coercive system commenced in 1817 was followed up in 1819 by the introduction of the bills since known by the name of the Six Acts. Now whatever difference of opinion may have existed, or may still exist, as to the amount of the danger which, at the period we allude to, was supposed to call for the interposition of the legislature, we suppose there are few persons who will, at this time, contend that it might not, at any rate, have been overcome by temporary measures of coercion. Few men now seriously believe that the land was in danger, because an enthusiastic shoemaker recommended an equal partition of it ; or that the proceedings at the Manchester meeting rendered it necessary to enact a permanent law, making a second conviction for a political libel punishable with banishment or transportation. (a) Yet, though

(a) The act subjects the person convicted of a second political libel to banishment ; and if the offender shall be found in any part of the King's dominions after the expiration of 14 days from his sentence of banishment, he is liable to be transported for 14 years. By the common law of the land, explained and confirmed by Magna Charta, no man could be expatriated. The King might exercise a paternal restraint upon his subjects by issuing his writ of *ne exeat regno* : he might, if he thought fit, retain the proudest of his subjects within his dominions ; but he had no power to banish the humblest of them from the country of his birth. Even this punishment of exile, however, was conceded as a boon by Lord Castlereagh ; and, in proposing another of the bills, that minister actually took credit to

himself for not making it felony of death, as he phrased it, to continue for half an hour at a public meeting under circumstances in which it might be physically impossible not to become the victim of such a law. It was reserved for Lord Castlereagh to introduce into our penal enactments the punishment of banishment *from the realm* ; but Barrington, in his observations on the more ancient statutes, mentions an ordinance for *bakers, brewers, and other victuallers*, of uncertain date, in which butchers and cooks, convicted of selling measly pork or unsound meat—*carnes porcinas supersennatas, vel carnes mortuas de morina*—were, for the first offence, to be heavily amerced ; for the second, to be set in the pillory ; for the third, to be imprisoned ; and for the fourth, to leave and abjure the

it can scarcely be denied that the Six Acts were founded upon erroneous and exaggerated views of the danger which was supposed to threaten the institutions of the country; and though, even admitting that the circumstances of the times called for their enactment, it must be conceded on all hands, that those circumstances have long since ceased to exist; the most obnoxious of these laws still continue to disgrace the statute-book; and a recent attempt to get rid of one of them was treated, in the House of Commons, in a manner which will not speedily be forgotten by the country. The possession, or the prospect of place, had wrought a singular alteration in the sentiments of gentlemen who originally opposed the measure; and while some openly defended it, others, with less intrepidity, shrunk from its discussion, under pretences as disingenuous as they were irreconcilable with true patriotism, and with the faithful discharge of the duties which the representatives of the people owe to their constituents.

We have adverted to the manner in which the coercive measures of 1817 were brought under the consideration of Parliament, because there is some similarity between the mode of proceeding resorted to by Lord Castlereagh on that occasion, and the course adopted by Sir Robert Walpole on the introduction of a measure, which we purpose to make the subject of a few observations, we allude to the bill which first established a Dramatic Censorship in this country. A farce called the "Golden Rump," said to be fraught with sedition and abuse of the government, had been offered to one of the managers of the theatres, who, either with a view of recommending himself to the minister, or of obtaining some reward for his forbearance, immediately put the manuscript into the hands of Sir Robert Walpole. The minister, who had long been annoyed by the freedom with which the measures of the administration had been attacked and ridiculed in theatrical productions, determined to make this farce of the "Golden Rump" a pretext for subjecting stage performances to a system of control, which should effectually relieve the government from all further annoyance of a similar description. He accordingly, after reading a number of extracts from this manuscript farce, introduced the measure, commonly called the Playhouse Bill, by which the number of playhouses is limited, and an arbitrary power is vested in the Lord Chamberlain, giving to that officer authority to expunge any part, or to suppress the whole of any dramatic pieces, which may be offered for representation on the stage. This measure,

village or town in which the offence was committed; "which I the rather take notice of," observes Barrington, "as it seems to be the only instance

in our law of punishing by a banishment from a particular place or district."

though in a constitutional point of view it was one of no ordinary importance, since it gave to an officer of the household, as was observed by Lord Chesterfield in his celebrated speech on the second reading of the Bill, a more absolute power than we entrust even to the Sovereign of the country; though it aimed indirectly a blow at the liberty of the press; though it imposed shackles on a branch of our literature; and created a monopoly in respect to theatrical property as objectionable, upon general principles of commercial policy, as it is injurious to the interests of the monopolists themselves, appears to have passed without much opposition, or discussion; the reading of the "Golden Rump" having as effectually convinced Parliament of the expediency of imposing permanent restrictions upon theatrical performances, and theatrical property, as the reading of the Spencean system of philanthropy convinced their enlightened successors of the necessity of restraining the rights and liberties of the whole nation. The speech of Lord Chesterfield on this subject, for which we are probably indebted rather to the vanity of that nobleman himself, than to any impression which it made upon his hearers, is the only evidence which remains to us of the bill having met with any opposition in its progress through Parliament. In the House of Commons it seems to have been hurried through its several stages with as much precipitation, and with as little discussion, as an ordinary turnpike bill. It was ordered to be brought in on the 20th of May, 1737, read the first time on the 24th, a second time on the 25th, committed and ordered to be reported with its amendments on the 26th, reported, all the amendments but one being agreed to, on the 27th, and passed on the 1st June, when Mr. Pelham was ordered to carry it to the Lords. In the House of Lords it was read the first time on the same day, the second time after a debate on the 2d of June, and the third time on the 6th of June. It was returned to the Commons on the 8th, and received the royal assent on the 21st of June.

The title of this bill affords an illustration of that species of political fallacy, by which, under pretence of explaining and amending a previous Act of Parliament, new provisions are introduced which were never in the contemplation of the legislature, and which are wholly without the scope of the Act said to be explained and amended. It is not introduced by a preamble stating that whereas the "Golden Rump" and other seditious and licentious theatrical pieces had recently been put forth to the great danger of the public tranquillity, and the manifest corruption of the public morals, it became expedient to impose certain restraints on the licentiousness of the stage. This would have been at least an intelligible ground for the provisions contained in the bill, but it seems to have been Walpole's object to withdraw attention from

the real nature of these provisions, and to smuggle the bill through Parliament with all convenient speed. He contented himself therefore with reading and commenting upon certain extracts from the "Golden Rump," and then moved for leave to bring in a bill to explain and amend so much of the 12th of Anne, entitled an Act for the more effectual punishing of Rogues, Vagabonds, Sturdy Beggars, and Vagrants, and sending them whither they ought to be sent, as relate to common Players of Interludes (b). The Act of the 12th of Anne included players who acted without a legal settlement in the place where they performed among vagrants, and subjected them to the same penalties as rogues and vagabonds. By Walpole's Bill it is further enacted that every person having or not having such a legal settlement, who shall for hire, gain, or reward, act or cause to be acted any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage, without authority by virtue of the King's letters patent, or without license from the Lord Chamberlain, shall for every such offence forfeit the sum of fifty pounds, and in case this penalty shall be paid or recovered, such offender shall not for the same offence suffer any of

(b) The expedients to which the unlicensed votaries of the histrionic art have been driven in order to evade the penalties inflicted by this Act are well exemplified in the following play-bill (the original is before us), which is curious in another point of view, as we here find the lady, who was destined to become the most dis-

tinguished tragic actress of her time, announced as *prima donna* (at Wolverhampton), in the opera of *Love in a Village*. There is considerable merit in the scheme of insinuating "polite literature" into the inhabitants of Wolverhampton, by the sale of an assortment of tooth-powder, at. 2s. 1s. and 6d. a paper.

MR. KEMBLE,

With humble submission

(To the Ladies and Gentlemen of Wolverhampton, and the town in general), proposes entertaining them

On Wednesday evening, the 8th Instant, at the TOWN-HALL,

With a CONCERT

of

VOCAL AND INSTRUMENTAL MUSIC,

Divided into three parts.

Between the several parts of THE CONCERT,

(For the Amusement of the TOWN, and the further improvement of POLITE LITERATURE,)

WILL BE CONTINUED

THE HISTRIONIC ACADEMY,

With specimens of

The various MODES OF ELOCUTION

BY INHABITANTS OF THE TOWN,

(For their diversion,)

Without fee, gain, hire, or reward.

the penalties inflicted by the statute of Anne. The penalty is made recoverable either by bill, complaint, or information in any of the Courts of Record at Westminster, or in a summary way before two Justices of the Peace.

We now come to the clauses which established the Dramatic Censorship by giving to the Lord Chamberlain the power of prohibiting the performance of the whole, or any part of any *new* dramatic production, which might be offered for representation on the stage, from the date therein specified.

“And be it further enacted, that from and after the 24th day of June, 1737, no person shall for hire, gain, or reward, act or cause to be acted any new interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage; or any new act, scene, or other part added to any old interlude, tragedy, comedy, &c., or any new prologue or epilogue, unless a true copy thereof be sent to the Lord Chamberlain fourteen days at least, before the acting thereof; together with an account of the playhouse, or other place

The specimens of this night's amusement will be taken from
A COMIC OPERA called

LOVE IN A VILLAGE,

Sir William Meadows, by Mr. K-M-B-L-E,

Young Meadows, by Mrs. S-D-D-S,

Justice Woodcock, by Mr. B-E-T-N,

Hawthorn, by Mr. C-E-R-E,

Eustace, by Mr. D-L-N-E,

Carter, by Mr. D-W-N-G,

Countrymen at the Statute, Mr. H-M-L-T-N, Mr. N-A-L-E, &c.

Hodge, by Mr. J-N-S,

Rosetta, by Miss K-M-B-L-E,

Lucinda, by Mrs. H-M-L-T-N,

Mrs. Deborah Woodcock, by Mrs. B-U-C-H-E,

Housemaid, by Miss F. K-M-B-L-E,

Cooke, by Mrs. N-A-L-E,

Madge, by Mrs. K-M-B-L-E,

And concluded with Comic Orations, &c.

from

The FIDLER turn'd CITIZEN.

* * This is to assure the Public that no money will be taken for admittance, nor will any Tickets be sold; therefore all persons inclined to attend the Concert are desired to call at Mr. LATHAM's, at the Swan, where tickets will be delivered GRATIS to his friends and acquaintance.

N. B. Mr. LATHAM has a quantity of TOOTH-POWDER (from LONDON), which he intends selling in papers, at 2s. 1s. or 6d. each. The same POWDERS may likewise be had at Mr. SMART's, and Mr. SMITH's Printing Office, and at the Talbot, in King Street.

The Concert to begin at 5 o'clock, and the LECTURES exactly at half-past 6.

It is humbly hoped no Ladies or Gentlemen will take it amiss, that they cannot possibly be admitted without a ticket.

where the same shall be, and the time when the same is intended to be, first acted, signed by the master or manager, or one of the masters or managers of such playhouse, or place, or company of actors therein.

“And be it enacted, that it shall and may be lawful for the said Lord Chamberlain to prohibit the acting of any interlude, tragedy, comedy, &c. or any act, scene, or part thereof, or any prologue or epilogue; and in case any person or persons shall for hire, gain, or reward, act or cause to be acted any new interlude, tragedy, comedy, &c. or any act, scene, or part thereof, or any new prologue or epilogue, before a copy thereof shall be sent as aforesaid; or shall act or cause to be acted any such entertainment as aforesaid, contrary to such prohibition; every such person so offending shall for every such offence forfeit the sum of fifty pounds, and every grant, license, and authority, by or under which the said master or masters, manager or managers set up, formed or continued such playhouse, or such company of actors, shall become absolutely void.”

By these provisions, legality was given to the control of stage performances, which had been assumed and exercised by the Lord Chamberlain for the time being, with more or less activity at various periods of our history. Hitherto the authority exercised, in theatrical matters, by the Lord Chamberlain, or by the Master of the Revels—an officer first appointed by Henry VIII., whose functions were nearly the same as those of the ancient Abbot of Misrule or Lord of the Pastimes—was founded merely on the will of the Sovereign respecting the regulation of amusements, which, though originally regarded only as a part of his private recreations, had become identified with the wants and necessities of the public. It was not recognized by law; but, though founded in usurpation, and in some instances grossly abused, as in the case of the order issued by the Lord Chamberlain in 1709, prohibiting the patentees of Drury-lane theatre from performing any longer, it had been, for the most part, patiently submitted to by those who might have legally resisted (c) it. In one memorable instance, which occurred

(c) Steele, who was deprived of his patent in the year 1719, on account of the part he took on the question of the Peerage Bill, made an appeal to the public in a periodical paper entitled *The Theatre*; and Cibber gives an account of his having successfully resisted the demand of a fee of 40*s.* made by the Master of the Revels on the acting of every new play, to which fee he suspected that

officer had no legal claim.—See *Cibber's Apology*, ch. viii. 10.—The first instance which has been recorded of the prohibition of a play by the Lord Chamberlain is that of the *Maid's Tragedy* of Beaumont and Fletcher, the performance of which was interdicted in the reign of Charles the Second. Lee's *Lucius Junius Brutus*, and Dryden's Prologue to *The Prophetess*, were afterwards

a few years before the passing of Walpole's bill, it interfered so oppressively with the rights of literary property, as to excite general disgust and dissatisfaction. Gay's Opera of *Polly*, a sequel to the *Beggar's Opera*, having been accepted by Mr. Rich, the manager, and every thing being ready for rehearsal, the Lord Chamberlain sent an order from the country, prohibiting Mr. Rich from suffering any play to be rehearsed on his stage, till it had been first of all supervised by his Grace. In his preface to the Opera of *Polly*, Gay gives the following account of the suppression of that piece:—

“It was on Saturday morning, December 7th, 1728, that I waited upon the Lord Chamberlain: I desired to have the honour of reading the opera to his Grace; but he ordered me to leave it with him, which I did, upon expectation of having it returned upon the Monday following; but I had it not till Thursday, December 12th, when I received it from his Grace with this answer—‘*That it was not allowed to be acted, but commanded to be suppressed.*’ This was told me in general, without any reasons assigned, or any charge against me of my having given any particular offence.”

He proceeds to state that, subsequently to the prohibition, he had been told that he was accused, in general terms, of having written many disaffected and seditious pamphlets; and he ascribes the suppression of his opera rather to the ill feeling which this false accusation had excited against him at court, than to any obnoxious passages in the opera itself; although there were not wanting those who also charged him with having filled his piece with immoralities, and with slander against particular great persons. There seems reason to believe, that the suppression of Gay's *Polly* originated in hostile feelings towards the author; for the piece contains nothing calculated to give offence, beyond such general strokes of satire as had delighted the town in the *Beggar's Opera*; and the moral of it is perfectly unexceptionable; for *Macheath*,

prohibited by the same authority, as was also the tragedy of Mary Queen of Scots, in the reign of Queen Anne; but this play being found, upon further consideration, to be a harmless production, was subsequently allowed to be acted. We can almost pardon the Master of the Revels for the way in which he exercised his assumed authority on Cibber's alteration of *Richard the Third*.—“When Richard the Third,” says Cibber, “as I altered it from Shakspeare, came from his (the Master's) hand to the stage, he expunged the whole first act without

sparing a line of it. This extraordinary stroke of a *sic volo* occasioned my applying to him for the small indulgence of a speech or two, that the other four acts might limp on with a little less absurdity. No! he had not leisure to consider what might be separately inoffensive. He had an objection to the whole act; and the reason he gave for it was, that the distresses of King Henry the Sixth, who is killed by Richard in the first act, would put weak people too much in mind of King James, then living in France.”

who is reprieved in defiance of the laws of poetical justice in the *Beggar's Opera*, is regularly hanged in the sequel. Of the illegality of the prohibition there can be no doubt; indeed, if any proof were wanting to establish the illegality of the Lord Chamberlain's proceeding, in addition to the absence of all legislative sanction to the power usurped by that officer, it would be the fact of the minister having deemed it necessary, nine years afterwards, to vest this power in the Lord Chamberlain, by an express clause in an Act of Parliament. Here we may see another motive for giving this extraordinary power to the Lord Chamberlain, by a declaratory rather than by a new law. Had Walpole's bill been called a bill to enable the Lord Chamberlain of his Majesty's household to prohibit the performance of dramatic pieces under certain circumstances, the introduction of such a measure would, in effect, have amounted to a declaration of the illegality of the suppression of Gay's opera, and of all similar acts of authority; but, by bringing forward the measure as a bill to explain and amend so much of the Vagrant Act as related to players, Walpole avoided this inconvenience; and there is nothing in the title of the Act, or on the face of its provisions, from which it can be inferred that it confers any new powers upon the Lord Chamberlain, or that it contains any thing beyond a more specific declaration of the powers to which he was by law entitled. The arbitrary prohibition of the performance of Gay's opera excited general disgust: the indignation of the people was roused by an act of oppression, which interfered at once with their own amusements, and with the rights of individuals; and, on the publication of the opera by subscription, the sympathy universally felt for the author is said to have fully indemnified him for the pecuniary loss he sustained by the exclusion of his production from the stage. That pecuniary loss, however, could not be estimated with any degree of certainty. Gay was in the zenith of his reputation: he had just realised upwards of two thousand pounds, by an opera of which the success had been unprecedented; and he had a fair title to expect a considerable accession of fortune from a piece which, whatever may have been said of its inferiority to the *Beggar's Opera*, abounds with strokes of pleasantry not unworthy of its author, and is, in its lyrical parts, fully equal to his more celebrated production. It is as an invasion of literary property, that the Lord Chamberlain's arbitrary and illegal suppression of this opera appears in the most odious light; and it is by considering Walpole's bill in this point of view, that we are enabled to form a correct estimate of the unjust and oppressive character of the measure. Precisely in the same ratio in which, before the passing of Walpole's bill, the invasion of literary property, on the part of the Lord Chamberlain, was odious and unjustifiable, was the introduction of a bill to legalise such invasions of literary property odious

and unjustifiable. There was the difference of legality and illegality, but no essential difference in the moral complexion of such acts of oppression, committed before and subsequently to the enactment of the Play-house Bill.

It may be fairly presumed, that this Act was never intended to give any additional security to the morality of the stage, and it will be easy, at any rate, to show that it is not calculated to afford any such security. Walpole's object was entirely political; his morality, both in his public and private capacity, was of too loose and flexible a character; and the interest which he took in mere literary subjects was too slight to render it probable, that he would have given himself much concern about the purity of the English drama, or that he would have deemed stage-performances worthy of legislative animadversion, had he not been annoyed by the sarcastic reflections on his administration, which abounded in such productions as Fielding's *Pasquin*; and the more formidable, though unrepresented farce of the "Golden Rump." The "Golden Rump," indeed, seems to have decided the fate of dramatic literature in this country. Had it not been for the "Golden Rump," a farce neither printed, acted, nor even accepted by the manager to whom it was offered for representation, but the reading of a few extracts from which, like Lord Castlereagh's readings from the "Shoemaker's System of Philanthropy," seems to have carried dismay and conviction to the breasts of an enlightened Parliament—the stage might still have remained unshackled by any legal restraints; the rights of dramatic authors might have been respected; and the spirit and energy which once characterised our dramatic literature might still have been unimpaired. But we are not left to mere inferences from the character of the minister, and from the nature of the political annoyance of which it was his immediate object to get rid, in arguing that the interests of morality formed no part of his motives for bringing forward the Play-house Bill. If Walpole had been desirous of improving or raising new securities for the morality of the stage, he had too much practical sagacity not to have introduced some provisions into his bill which might have effectually accomplished his object; but his bill leaves the morality of the stage precisely where it was before. The power of supervision vested in the Lord Chamberlain is expressly limited to *new* plays, and to *new* scenes or additions made to old ones. This limitation was well enough calculated (d) to suppress theatrical pasquinades of a

(d) It is true that nothing contained in the 10th of Geo. II. could have prevented the performance of the *Pasquin*, *Historical Register*, &c. of Fielding, in which the conduct of the ministry

was severely satirised. But the popularity of these pieces was but of short duration. Fielding got together, in the year 1735, a company of performers, who assumed the title of the

political description, and to cut off, for the future, this source of political annoyance; but how did it affect the morality of the stage? It left all the licentiousness and immorality to be found in our dramatic literature, from the rise of the English stage down to the 24th of June, 1737, wholly untouched: it left the managers of theatres at perfect liberty to re-produce all the filth and obscenity scattered, with no unsparing hand, over the writings of our older dramatists: it left them at perfect liberty to perform, without stint or curtailment, the plays of more modern writers, from which the sturdy sectarian, Jeremy Collier, in his view of the immorality and profaneness of the English stage, had collected a mass of passages which could not be denied to afford some colour to his charge. (e) If the stage, therefore, has become more pure, the improvement cannot be ascribed to the efficacy of a measure which left all its impurities uncorrected. If, at the present day, the comedies of Congreve and Vanbrugh are excluded from the stage, the exclusion is not to be ascribed to the virtuous discrimination of Lords Chamberlains, or their deputies, but to the refinement, perhaps to the fastidiousness, of the public taste. Some years ago, an attempt was made by the managers of Covent-garden theatre, to revive some of the comedies of Congreve, Vanbrugh, and Cibber, after they had been subjected to such expurgatory alterations as seemed calculated

Great Mogul's Company of Comedians, and produced at the Haymarket theatre his *Pasquin*, which was acted to crowded audiences for 50 nights. The next year he produced several pieces of the same description, which met with a less favourable reception. The novelty of the design was over, and the Great Mogul's company was soon disbanded.

(e) Jeremy Collier takes his extracts chiefly from the plays of Dryden, Congreve, and Vanbrugh. Upon these he pours forth the phials of his wrath with a vigour which would do credit to a more orthodox assailant; but he shows a disposition to view the productions of the older dramatic writers, particularly those of Ben Johnson, and Beaumont and Fletcher, with a more favourable eye. Jeremy's wrath is too fervid and vituperative to be discriminating. Let the reader turn to the "*Custom of the Country*" of Beaumont and Fletcher, which we mention, because it was a favourite stock-piece, before

the taste for Shakspeare superseded the popularity of these authors, and decide whether any passages are to be found in the plays of Dryden, Vanbrugh, and Congreve, so obscene and licentious as many which are to be met with in that comedy. Jeremy Collier's book was followed by a more orthodox and elaborate, but less lively, exposition of the immoralities of the stage. In the year 1719, the Rev. Arthur Bedford put forth "A serious Remonstrance in behalf of the Christian Religion, against the horrid Blasphemies and Impieties which are still used in the English play-houses, to the great Dishonour of Almighty God, and in contempt of the Statutes of this Realm; showing their plain Tendency to overthrow all Piety, and advance the Interest and Honour of the Devil in the World, from almost 7000 Instances taken out of the Plays of the present Century, and especially the last five Years, in Defiance of all Methods hitherto used for their Reformation."

to quiet the most scrupulous morality, and to appease the fiercest virtue. The comedies were admirably acted, but the attempt failed; for the wit of these writers, after all that could be effected in the way of thinning its luxuriances, was found to be too strongly impregnated with licentiousness to be tolerated by a modern audience.

After the failure of this experiment, a failure which many admirers of the drama attributed to excess of delicacy, or what *Lady Wishfort*, in one of the comedies of these proscribed dramatists, calls "the minute particular of severe virtue," it can hardly be pretended that the public may not be safely entrusted with the care of their own morals, in so far as their morals are likely to be affected by the representation of dramatic productions, whether old or new. No modern writer for the stage would venture to offend the prevailing taste by imitating the pruriences of the older dramatists; immoral, or even equivocal expressions are of comparatively rare occurrence in modern plays; and if the public do most effectually guard against a moral contagion, to which the law leaves them wholly exposed, they must surely be capable of protecting themselves under circumstances in which there is hardly any risk of infection. The virtue of his Majesty's play-going subjects is at least as secure in their own keeping, as under the censorship and regulation of the Lord Chamberlain, or the Lord Chamberlain's deputy.

We have said enough, we believe, to prove that the Dramatic Censorship vested in the Lord Chamberlain by the Act of the 10th of Geo. II. affords no security to the morality of the stage; that such security was probably never in the contemplation of the author of the measure; and that, supposing it to be one of his objects, the Act is, from the nature of its provisions, wholly inoperative in this respect, while it is efficient only as an instrument of injustice and oppression. We can scarcely imagine, in the event of the repeal of this Act being moved for, that the Dramatic Censorship would find any defenders on the ground of its affording protection to the morals of the people. Undoubtedly there are individuals to be met with even in our Houses of Parliament, whose public declarations of opinion, if we cannot suspect them of being dictated by a desire to promote the happiness, have, at least, the effect of contributing to the amusement of mankind; but there are limits to these powers of affording entertainment, and within these limits we are inclined to place the extravagance of maintaining, that in the present state of the public taste with respect to theatrical performances, it is necessary and fitting that the morals of the public should be protected by the author of "Broad Grins."

But, if the Dramatic Censorship afford no security to the

morality of the stage, let us proceed to inquire whether it be worth maintaining as a political security; whether it may reasonably be supposed to have contributed, hitherto, to the safety and tranquillity of the state; and whether, judging from the past cases in which the power of the Censor has been exercised, we may fairly infer that the existence of such a power and the exercise of such an authority are calculated to strengthen the hands of the king's government in future. If the Dramatic Censorship be not calculated to strengthen the hands of the government, there is an end to the argument founded upon the supposition of its operating as a political security; but, if it have that effect to a certain extent, we are further called upon to inquire, in considering the expediency of repealing the 10th of Geo. II., whether the advantage accruing to the government from that enactment, be in any degree proportioned to the injury which it inflicts upon individuals. If the injury which the Act inflicts upon individuals can be shewn to be certain and positive, while any security which the government may derive from it is doubtful and contingent, a fair case will, we apprehend, be made out for its repeal. There are other considerations, which tend considerably to strengthen the arguments for the repeal of this measure, namely, the unconstitutional nature of the power vested in the Lord Chamberlain, a point much insisted on by Lord Chesterfield in his speech on the second reading of the Bill, and the injurious influence of the censorship on the spirit and character of our dramatic literature.

As no portion of the "Golden Rump" has been preserved, we are left to conjecture the amount of danger to the government which was averted by the timely suppression of that farce. Lord Chesterfield, in opposing the bill, expressed in strong terms his abhorrence of such scandalous productions, and we may conclude therefore that it merited all the severity of the comments which Walpole is said to have made upon it. It must not be forgotten, however that, as far as the Golden Rump was concerned, the minister had no *corpus delicti* upon which he could fairly found a penal enactment, for that farce had not only not been performed, but had been rejected by the manager to whom it was offered. Besides, it is not impossible, nor is it perhaps a very extravagant supposition, that the Playhouse Bill was not brought forward on account of the Golden Rump, but the Golden Rump fabricated for the purpose of introducing the Playhouse Bill. Upon that supposition any amount of turpitude in the farce would be easily accounted for, and the ground for legislative interference might have been made, *ad libitum*, as strong as the author of the bill could desire. But, though we have no relics of this celebrated farce, we have the means of judging of the species of dramatic composition, which really excited the fears of the government, in

Brooke's tragedy of *Gustavus Vasa*, the performance of which was prohibited by an order from the Lord Chamberlain's office, in the year 1739, when the play had arrived at the last rehearsal. The subject of this tragedy is a successful attempt on the part of Gustavus, the legitimate king of Sweden, to recover the possession of his throne, which was usurped by Christian the Second, king of Denmark. At a time when a pretender to the throne of these kingdoms existed, the Lord Chamberlain might perhaps have considered it prudent to object generally to the subject of this play, without reference to the manner in which the author had treated it; but it is most probable that the prohibition of *Gustavus Vasa* was occasioned by particular passages in the drama, in which liberal and patriotic sentiments were too prominently introduced to be palatable to the existing government. The following are, in all probability, some of the passages which gave the greatest offence:—

“ 'Tis nobly promis'd ;
For worth is rare, and wants a friend in Sweden.”

“ —The tyrant spoke, and his licentious band
Of blood-stain'd ministry were loos'd to ruin.”

“ He has debauch'd the genius of our country,
And rides triumphant, while her captive sons
Await his nod, the silken slaves of pleasure,
Or fetter'd in their fears.”

Some passages might be regarded with the more alarm, as they were not encumbered with any precise meaning ;

“ A cause like ours is its own sacrament ;
Truth, justice, reason, love, and liberty,
Th' eternal links that clasp the world, are in it ;
And he who breaks their sanction breaks all law,
And infinite connexion.”

“ Here I take my stand !
Although contention rise upon the clouds,
Mix heav'n with earth, and roll the ruin onward ;
Here will I fix, and breast me to the shock,
Till I, or Denmark fall.”

These speeches certainly savour a little of “ hydrostatics, and other inflammatory branches of learning,” but an audience whose loyalty could withstand the tirades of ancient Pistol, against which the legislature afforded no protection, might well enough, we should think, have escaped uncontaminated even by these patriotic effusions. Besides, the effect of passages of this description is sufficiently counteracted by many others of a most unexceptionable

tendency, though in the reign of George the Second, when legitimacy was not at so high a premium as it is at present, their merit might not be duly appreciated. Gustavus, though in the disguise of a copper-miner, and though fully participating in the toils of his fellow labourers, for

“ His hands out-toil the hind, while on his brow
Sits Patience, bath'd in the laborious drop
Of painful industry,”

is nevertheless described as striking every body with that undefinable awe which legitimate sovereigns are wont to inspire ;

“ Amid these mines he earns the hireling's portion—
Six moons have chang'd upon the face of night,
Since here he first arriv'd, in servile weeds,
But yet of mien majestic, I observed him ;
And ever as I gaz'd, some nameless charm,
A wondrous greatness, not to be concealed,
Broke through his form, and aw'd my soul before him.”

In short the copper-miners of Dalecarlia, in the tragedy, distinguish the monarch in his mining jacket, as plainly as the lady in the farce could see the gentleman through the coarsest corderoys. In another part of the tragedy the same sentiment is inculcated, for the heroine of the piece describes Gustavus, as wearing even his chains like coronation robes.

“ What then was my amazement ! he was chain'd,
Was chained ! like the robes
Of coronation, worn by youthful kings,
He drew his shackles.”

There are some few spirited passages in this tragedy ; but it is too deficient in dramatic interest to be effective on the stage, and it is, upon the whole, much too feeble a production to justify the alarm, or to excite the hostility of a government, except perhaps upon the grounds we adverted to, which have ceased to exist with the extinction of the family of the Stuarts. There was no lack of zeal at this time on the part of the Dramatic Censor in exercising his new functions, for in the same year Thomson's *Edward and Eleanor* was suppressed, upon what grounds, Johnson observes, it would be hard to discover. Three reasons may be assigned for the suppression of this play, however little they may justify such an exercise of authority. In the first place, Thomson had rendered himself obnoxious to the ministry by his poem called *Liberty* ; secondly, the tragedy was partly written for the purpose of eulogising the Prince of Wales, who possessed no share

in the affections of his royal father; and thirdly, it contains many such alarming passages as the following:—

“ Besides, who knows what evil counsellors
Are gather'd round the throne! In times like these,
Disturb'd and low'ring with unsettled freedom,
One step to lawless pow'r, one bold attempt
Renew'd, the least infringement on our charters
Would in the giddy nation raise a tempest.”

“ He who contends for freedom
Can ne'er be justly deemed his sovereign's foe.”

“ A nobler office far! on the firm base
Of well-proportioned liberty to build
The common quiet, happiness, and glory,
Of king and people, England's rising grandeur.
To you, my prince, this task of right belongs.
Has not the royal heir a juster claim
To share his father's inmost heart and counsels
Than aliens to his interest, those who make
A property, a market of his honour.”

“ Think what cares,
What vigilance, what toils, what bright contention
In councils, camps, and well-disputed serates,
It cost our generous ancestors to raise
A matchless plan of freedom; whence we shine
E'en in the jealous eye of hostile nations
The happiest of mankind; then see all this,
This virtue, wisdom, toil, and blood of ages,
Behold it ready to be lost for ever.”

The prohibition of Foote's play of the *Trip to Calais*, which was obtained through the influence of the Duchess of Kingston with the Lord Chamberlain, does not immediately belong to the part of the question we are now considering, namely, the effect of the Dramatic Censorship, as a political security, unless the protection of the character of the aristocracy *per fas et nefas* be deemed a part of the legitimate influence of the government. We may observe however, in passing, that the prohibition of the *Trip to Calais* places in a striking light the arbitrary nature of the power entrusted to the Lord Chamberlain. If the Duchess of Kingston could have proved that her character was libelled in this play, by evidence of the intention of the author to ridicule her in the part of *Lady Kitty Crocodile*, the courts of law were open to her for redress; but there could have been no foundation in this case for the Lord Chamberlain's arbitrary invasion of the rights of property, except the private communication of the Duchess's belief that she was the person satirised by the dramatist, which belief might have been entirely unfounded, and was not sustained by any positive evidence on the face of the drama.

In the year 1823, the tragedy of *Caius Gracchus* was for some time withheld from the stage, in consequence, we presume, of the objections entertained by the Deputy Censor to the subject of the play, for when the piece was at length suffered to be performed, it was evident that there was nothing in the author's mode of dramatising the conspiracy of the Roman Tribune which could possibly have offended the most captious censor, or alarmed the most timid politician. The application of the proverb *ex pede Herculem* may not always lead to sound conclusions; the magnitude of a whole, which is unknown, cannot always be inferred from the magnitude of a part which is known, but we may safely enough conclude, upon inspection of a child's foot, that the member does not belong to a hero six feet high. To give an instance from this tragedy: when Gracchus is informed that a lictor has been slain by the insurgents, he expresses a becoming horror at the crime, and puts the following searching questions to the people:—

“ Why did you this?
Why do you ever, what you should not do?”

We have here a whole system of ethics compressed into a single line, which has this additional merit, that it admits of being scanned upon the fingers. The morality inculcated in this verse is as pure as that of the Oxonian doctor, who maintained that every man who lives in this round world ought to be virtuous; and, conversely, that no man who enjoys that privilege, should be vicious; *omnes homines qui vivunt in hoc rotundo orbe debent semper esse boni, nec unquam mali*. We think the evidence of this line, without more, sufficient to establish the purity of the author's intentions, and to prove that a poet, imbued with such unexceptionable principles, was not likely, in any of his dramatic effusions, to endanger the stability of existing institutions.

The next play on which the Censor exercised his shears with a vigour which led to its withdrawal from representation was Mr. Shee's tragedy of “*Alasco*.” On this occasion Mr. Shee addressed a spirited remonstrance to the Lord Chamberlain, on the conduct of his Deputy, in which he complained of “the unsparing mutilation which his tragedy had undergone, as if every sentiment of political liberality, and patriotic virtue, every expression which could be construed into a disapprobation of tyranny, usurpation, and oppression,—even the very words ‘tyrant,’ ‘despot,’ ‘slave,’ ‘shackle,’ and ‘chain,’ however introduced, accompanied, or recommended, were to be considered as an inexpiable offence against dramatic decorum, and to be visited by the vengeance of theatrical exclusion.” To this remonstrance the Lord Chamberlain returned an answer, which as it showed at once the necessity and the inex-

pediency of delegating his literary functions to a deputy, furnished, *pro tanto*, an argument for the abolition of the censorship. The following was the letter addressed by the Lord Chamberlain to Mr. Shee, in answer to his remonstrance.

“ Grosvenor Square, 19th Feb. 1824.

“ Sir,

“ Thinking Mr. Colman a very sufficient judge of his duty, and as I agree in his conclusion (*from the account he has given me of the tragedy called Alasco*), I do conclude, that at this time, without considerable omissions, the tragedy should not be acted; and whilst I am persuaded that your intentions are upright, I conceive that it is precisely for this reason (though it may not strike authors,) that it has been the wisdom of the legislature to have an examiner appointed, and power given to the Chamberlain of the Household to judge whether certain plays should be acted at all, or not acted at particular times.

“ I do not mean to enter into an argument with you, Sir, on the subject; but think that your letter, conceived in polite terms to me, calls upon me to return an answer, shewing that your tragedy has been well considered.

I remain, Sir, with esteem,

Your obedient servant,

MONTROSE.”

His Grace was entirely mistaken in supposing that the legislature had in its wisdom appointed two officers; one to examine plays, and another to judge, without examination, and upon the bare report of the examiner, whether the writers of the plays should be punished. The fact is, that the legislature had committed the folly of imposing duties upon an officer of his Majesty's Household, which must in general be incompatible with his more exalted functions and pursuits, and which, considering the little time so distinguished a person can have to devote to literary subjects, he must, for the most part, be incapable of executing. His Grace's notions of the division of judicial labour were peculiar: in common parlance the act of judging presupposes deliberation, and the same person, who passes sentence upon an offence, is also supposed to have inquired whether the offence has been committed; but, in the case of Mr. Shee's tragedy, the deliberative functions of the judge were executed by proxy, and his Grace persuaded himself that the wisdom of the legislature had so conveniently separated the deliberative from the executive duties of the Dramatic Censorship, that his part of the labour consisted, not in inquiring whether the author had or had not committed any offence, but in deciding, upon the report of a third person, whether the author should or should not be punished. Nothing certainly could be less calculated to satisfy the feelings of a writer, who claimed redress for an injury done to his property and reputation, than the reply of the Ex-Chamberlain to the author of *Alasco*. “ I think my deputy,” says his Grace, “ who is ap-

pointed under the wise sanction of the legislature, a very sufficient judge of his duty, and as there is nothing in the report he has made to me on the subject of your play which justifies your complaints, my conclusions are the same as the conclusions of my deputy. I do not mean to enter into an argument with you, but, as your letter is conceived in polite terms, I think it right to shew that your tragedy has been well considered!" Apply this mode of proceeding to any of the ordinary transactions of life, to which fortunately the law renders it inapplicable, and its injustice will become manifest. If the agent of A, the head of a commercial firm, defraud B, in that capacity, of a part of his property, and B demand restitution of A, what construction should we put upon such an answer as the following on the part of A? "Mr. C has been appointed our agent, under the articles of partnership agreed to by the firm. We place the utmost reliance upon his integrity, and as he makes no mention of fraud in the statement he has transmitted to us of the account between you and the firm, our conclusions are the same as the conclusions of Mr. C. It is not our practice to refund, and we do not mean to go into the items, but, as your letter is civilly written, we feel ourselves bound to show that you have been fairly dealt with." The Deputy Censor, be it remembered, is commonly selected from a class of persons, the *genus irritabile vatum*, not the least likely to be influenced by literary prejudices and prepossessions, or to discover a want of temper and impartiality in passing judgment on the productions of their contemporaries. The hostility shewn by this subordinate officer to the tragedy of *Alasco*, was probably exasperated, if not occasioned, by a passage in the play which he might have construed into an attack upon his official dignity:—

"Why, if there were some slanderous tool of State—
Some taunting, dull, unmanner'd deputy."

It is hardly necessary to observe, that this is one of the passages expunged by the Deputy Censor: we will add a few others which underwent the same fate, that it may be seen how much the State is indebted to that officer for the vigilant discharge of his inquisitorial functions:—

"What little skill the patriot sword requires,
Our zeal may boast in midnight vigils school'd.
Those deeper tactics well-contrived to work,
The mere machine of mercenary war
We shall not need, whose hearts are in the fray—
Who, for ourselves—our homes—our county, fight;
And feel in every blow we strike for freedom."

"Tyrants, proud Lord, are never safe, nor should be;
The ground is mined beneath them as they tread:

" Haunted by plots, cabals, conspiracies,
Their lives are long convulsions, and they shake
Surrounded by their guards and garrisons."

" But shall I reverence pride, and lust, and rapine?
No!"

Mr. Shee infers, with some show of reason, from the erasure of the *negative* to this question, that "yes" would have been more palatable to the Deputy Censor.

" To brook dishonour from a knave in place."

" When Roman crimes prevail, methinks 'twere well,
Should Roman virtue still be found to punish them.
May every Tarquin meet a Brutus still,
And every tyrant feel one!"

" 'Tis not rebellion to resist oppression;
'Tis virtue to avenge our country's wrongs,
And self-defence to strike at an usurper."

" Oh! God!—he has rush'd unarmed amidst his foes."

" *Hell's hot blisters* on the back
They turn so basely."

" Oh! God of Mercy! Murder! Oh! my husband!"

The three last instances of erasure are curious, seeing that they proceed from the pen of the author of *Broad Grins*, *My Night-gown and Slippers*, and *Poetical Vagaries*. There is no class of functionaries, according to the proverb, so skilful in apprehending delinquents, as those who have most assiduously cultivated the art of making other men's property their own; and it is upon this principle, we presume, that the extreme fastidiousness of the Deputy Censor is to be accounted for: he detects an exceptionable expression, and makes where he does not find an indecent allusion, with that excess of purity and superlative display of delicacy, which could belong only to a practised offender against the laws of decency and decorum.

Upon a review of the dramatic productions which have been suppressed upon political grounds—and we have given a fair specimen of the most formidable passages in these productions—what, we would ask, can it be reasonably inferred that the State has ever gained by their suppression? and, above all, what is the Government likely to gain in the present times, and in the present state of the public taste and feeling with regard to theatrical performances, by the continued exercise of the arbitrary power entrusted to the Dramatic Censor?

Non tali auxilio, nec defensoribus istis
Tempus eget—

It must be obvious to the frequenters of theatres that, in these days, there is as little disposition, on the part of the people, to approve of seditious sentiments, as to countenance immorality or profaneness on the stage. Patriotic sentiments are indeed applauded; but the patriotism and the loyalty of an English audience go hand in hand. Our King and country—the wooden walls of old England—the equality of a Briton to three or more foreigners—these are the allusions which are most in unison with the feelings, and which never fail to extort the applause, of our play-going countrymen. But we will further ask those who believe that the Government derives some advantage from the Dramatic Censorship—we confess our scepticism as to the smallest accession of real power being obtained by the Government from this source—whether that advantage bears any proportion to the amount of injury inflicted, by the arbitrary exercise of the censorial authority, on individual rights and interests? Is it a compensation for the insecurity to which the Censorship subjects literary property, a species of property at least as much entitled to protection as that which is the produce of labour chiefly manual or mechanical, and which it is especially the interest of an enlightened government to protect? Is it a compensation for the evil resulting from almost the only instance, existing in this country, of an unconstitutional, because an uncontrolled and irresponsible authority? Finally, is it a compensation for the paralysing influence of the censorship on an elegant, and, as it is connected with the improvement of the national taste and manners, an important branch of our literature? The Censorship injures dramatic literature in two ways: it disgusts the most eminent and the most independent men of letters, who have long since ceased to write for the stage; and it cramps the energies, and leads to unworthy concessions on the part of those who submit to its authority. Its effects, though differing in degree, have been essentially the same as those which have resulted from the censorship of the press in other countries—and it is undoubtedly to be regarded as one of the causes which have most powerfully contributed to the decay of the English drama. “Among the causes of the decline of literature,” says (f)

(f) *Ego vero literas non parum sufflaminari puto severis librorum censuris, quibus efficitur ut nil nisi molle quoddam, demissum, humile, enervatum, languidum, ac senile sit expectandum. Censuræ enim aut timiditate, aut ignorantia, aut pravo gustu suppressi sæpe solent optimæ notæ libri, aut expungi nobilissimæ meditationes. Si quis de effectu harum censurarum dubitet, comparet modo libros qui carnicinam hanc*

subierint cum iis qui absque censura sint impressi, et videbit quantum distant æra lupinis. Objicitur quidem scriptorum quorundam licentia, quæ hisce compedibus sit reformanda. At e duobus malis eligendum est minus; at utilitas quam cautio hæc parit, levis est præ incommodo, quod inde fluit. Quo cultior gens aliqua sit, eo indulgentior est in scriptores. Holbergii Opusc. tom. 2, p. 71.

a celebrated Danish writer, who had himself suffered severely from the shears of the Censor, " must be taken into account the censorship of books, the effect of which is to check the publication of all but dull, languid, enervated productions. Books of the best character are constantly suppressed; and in those which are tolerated, the noblest thoughts are expunged by the timidity, the ignorance, or the bad taste of Censors. If any one should doubt the effect of this Censorship, let him compare the books which have undergone this torture with those which have been published without being subjected to any previous scrutiny, and he will see how entirely they differ in character. We are told of the licentiousness of certain writers, which it is necessary to restrain by these shackles: but of two evils the least should be chosen; and the advantage arising from this precautionary measure is trifling, in comparison of the inconvenience which results from it. The more a nation advances in civilization, the greater is the indulgence shown towards writers." The Government of this country standing high, as it does at the present period, in the esteem and confidence of the people; and pursuing, upon questions affecting the most important national interests, a liberal and enlightened course of policy, can well afford its assent to the repeal of an obnoxious statute, which contributes in no essential degree to the security of the State, while it inflicts all the evils to which we have endeavoured to draw attention; and we are not without hope, that the time is fast approaching, when the abolition of the Dramatic Censorship will give the present administration an additional claim to the gratitude of the nation.

We proceed to that section of the 10th Geo. 2, c. 28, which restricts the performance of theatrical entertainments to the city and liberties of Westminster, and the places of his Majesty's residence; " Provided, always, that no person or persons shall be authorised by virtue of any letters patent from his Majesty, his heirs, successors, or predecessors, or by license of the Lord Chamberlain for the time being, to act for hire, gain, or reward, any interlude, tragedy, &c., in any part of Great Britain, except in the city of Westminster, and within the liberties thereof; and in such places where his Majesty, his heirs, or successors, shall in their royal persons reside, and during such residence only."

It follows, as a corollary from this clause, that any person or persons who attempted to represent any theatrical entertainment for gain, hire, or reward, in any part of Great Britain, except within the city and liberties of Westminster, were liable to be prosecuted for the penalties inflicted by this act; and so the law continued, *exceptis excipiendis*, that is, excepting certain modifications of the severity of this act established by the decisions of the Court of King's Bench; and excepting cases in which private acts

were obtained, for authorising theatrical performances in certain provincial towns, till the year 1788. Public diversions, not comprehended under the terms interlude, tragedy, &c. and other entertainments of the stage, as enumerated in the 16th of Geo. II., were still left to the common law; that is to say, people were not punishable for amusing themselves with music, dancing, and other entertainments of the like kind, in houses, rooms, or gardens of public resort, provided they committed no breach of the peace. In the Act of the 25th of Geo. II. (g), however, the legislature steps in with a parental solicitude for "the lower sorts of people;" and, "lest they should be tempted to spend their small substance in riotous pleasures," it prohibits every species of public diversion in the cities of London and Westminster, and within twenty miles thereof, unless authorised by the justices at quarter sessions; it declares all houses, rooms, and gardens, in which such entertainments shall be given without a license to be disorderly; and gives power to constables and others duly authorised, to seize all persons who may be found in such places, in order that they may be dealt with according to law. Public amusements, among which theatrical performances are entitled to the first place, may be regarded as essential wants in populous and opulent districts: yet, inconvenient and oppressive as the provisions of the 10th of Geo. II. were found to be, in the restraints they imposed on the rational enjoyments of the public, there was of course no lack of activity on the part of those to whom the exclusive right of performing plays was granted, to resist every attempt at supplying the demand for amusement, which was construed into an invasion of their supposed privileges. In the year 1787, the Royalty Theatre was opened by Mr. John Palmer, who supposed that the Lieutenant-Governor of the Tower was empowered by the royalty of that fortress to license the performance of plays. The patentees of Covent-Garden Theatre immediately served Mr. Palmer with a notice, apprising him that instructions were given to lodge informations against him for every appearance he should make in any play contrary to the statute.

(g) The grammar of this Act of Parliament is as pure as the spirit of benevolence in which it was enacted. e. g.—Be it enacted that any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London and Westminster, or within twenty miles thereof, without a license had for that purpose from the last preceding Michaelmas quarter sessions of the peace, to be holden for

the country, city, riding, liberty or division, in which such house, room, garden, or other place is situate, (who (i. e. the quarter sessions) are hereby authorised and empowered to grant such licenses as they, in their discretion, shall think proper), signified under the hands and seals of four or more justices there assembled, shall be deemed a disorderly house or place, &c.

Two magistrates were at this time fined 100*l.* each, and rendered incapable of acting in the commission of the peace, for having discharged Mr. Bannister, who had been informed against as a vagabond; and when the Royalty Theatre was afterwards opened for musical and pantomimical performances, an information was actually laid against Delpini the clown, for crying out "roast beef," in a pantomime. Similar activity was displayed on a subsequent attempt to introduce the regular drama at the Pantheon; and, more recently, a manager of one of the minor theatres, who greatly improved the character of the performances at this place of entertainment, was informed against by the proprietors of a patent theatre, for having incurred the penalties inflicted by the 10th of Geo. II. Afterwards the same manager, having become lessee of Drury-lane Theatre, with a laudable preference of legal to moral considerations, laid informations in his turn against his successor at the Minor Theatre, for continuing the same description of performances which the informant had himself introduced. At the present time, the penalties inflicted by the 10th of Geo. II. are recoverable against the proprietors of the Surrey, Cobourg, and other theatres, whose performances undoubtedly come within the meaning of that act; and if informations are not every day laid against them, they owe their tranquillity not to the state of the law regarding public amusements, but to the influence of public opinion; by which, attempts to make the law an instrument of oppression are discouraged, and the errors of legislation, in this way, to a certain extent corrected. It may be useful, in this place, to point out the state of the law respecting theatrical and other public entertainments, with as much distinctness as the nature of the enactments on this subject, and some conflicting decisions as to the meaning of the legislature, will admit.

In the first place, there is the 10th of Geo. II. c. 23, which, as we have already had occasion to notice, contains three distinct provisions. It explains and amends the 12th of Anne,—which act subjected players, performing for gain, hire, or reward, in a place where they had no legal settlement, to the same penalties as rogues and vagabonds;—exempting such persons from all other pains and penalties on payment of the penalty of 50*l.*: it next vests the Dramatic Censorship in the Lord Chamberlain; and, thirdly, it restricts all theatrical performances to the city and liberties of Westminster.

Next comes the 25th of Geo. II., which places all public diversions under the control of the magistracy. There is a clause in this act providing, "that nothing in the act shall be construed to extend to the Theatres Royal, in Drury-lane and Covent-garden, or the King's Theatre in the Haymarket; nor to such performances as are, or shall be, lawfully carried on by virtue of letters patent

or license of the Crown, or the license of the Lord Chamberlain of his Majesty's household." In the case of *Gallini v. Laborie*, however, 5. T. R. 242, Lord Kenyon said that this clause was inserted on the supposition, that those three theatres would be licensed by the Lord Chamberlain (it appeared in this case that the Opera House had no such license), and that the legislature did not mean to except them unless they were licensed. It was also held, in this case, that dancing was included in the words "other entertainments of the stage," in the 10th of Geo. II. But in the case of the *King v. Handy*, 6. T. R. 286, where the defendant had been convicted under the 10th of Geo. II. for performing a certain entertainment of the stage called "tumbling," at an amphitheatre in Birmingham, it was held that, as this was a penal Act of Parliament, and the entertainment of tumbling did not exist at the time the act was made, being subsequently introduced at Sadler's Wells, it could not be taken to be within the meaning of the legislature. The court at the same time intimated, that it was perhaps desirable that the prohibitions contained in the 25th Geo. II. as to London, Westminster, and places within twenty miles thereof, should be extended to the other parts of the kingdom. In *Gallini v. Laborie*, it was contended by counsel, that "dancing" could not fall within the meaning of the 10th Geo. II.; because that act required a copy of the entertainment to be sent to the Lord Chamberlain, and no copy could be sent of the entertainment called dancing; but Lord Kenyon said, that the clause requiring a copy of the entertainment could, of course, only apply to such entertainments as were recited from written compositions. Afterwards, however, in the *King v. Handy*, where Lord Kenyon confessed that he was mistaken as to the extent of the operation of the 10th of Geo. II., that learned judge adopted, in his judgment, the argument formerly urged by counsel; and made it one of the grounds of his decision in favour of "tumbling," that no copy of such a performance could be previously sent to the Lord Chamberlain.

Private Acts of Parliament were obtained, from time to time, by divers provincial cities and towns, for exempting them from the provisions of the 10th of Geo. II., and, at length, the 28th of Geo. III., after setting forth this circumstance, and further reciting, that "it might be expedient to permit and suffer, in towns of considerable resort, theatrical representations for a limited time, and under regulations, in which, nevertheless, it would be highly impolitic, inexpedient and unreasonable, to permit the establishment of a constant and regular theatre, empowers justices of the peace, at general or quarter sessions, to grant licenses at their discretion for the performance of such tragedies, comedies, &c. as now are, or hereafter shall, be acted at either of the patent or licensed theatres

in the city of Westminster, or as shall, in the manner prescribed by law, have been submitted to the inspection of the Lord Chamberlain, at any place within their jurisdiction, for any number of days not exceeding sixty; so as such place be not within twenty miles of the cities of London, Westminster, or Edinburgh, or eight miles of any patent or licensed theatre, or ten miles of the residence of his Majesty, or within fourteen miles of the universities of Oxford or Cambridge, or at any place within the same jurisdiction, at which, within six months preceding, a license shall have been granted under this act.

Such is the substance of our code of laws respecting public entertainments, wherein it can scarcely be denied that the compound wisdom of the legislature and of the expounders of the law is mixed up with no inconsiderable leaven of uncertainty, absurdity, and confusion. A man, for example, may tumble at Windsor, but not at Hounslow; and if we take the extreme limit of the distance from the metropolis designated in the 25th of Geo. II., we may suppose a house or theatre so situated, that tumbling shall be a lawful amusement on one half of a stage and a disorderly entertainment on the other, so that one moiety of the tumblers and spectators may disport themselves without interruption, as at common law, while the other moiety may be seized by constables, and dealt with according to the statute. The enactments relating to public amusements are for the most part either nugatory, or mischievous in their operation, and the only effectual remedy, perhaps, for these evils would be to consolidate this branch of legislation into a single Act of Parliament, of which the abolition of the censorship, and the removal of all restrictions as to the locality of theatres, and the nature and description of the performances exhibited in them, in other words, the throwing open of the trade in theatricals, might be adopted as the basis. Such a proposition would of course be encountered by an appeal to supposed vested rights and interests, and we are ready to admit, that, to a certain extent, compensation to the patentees must be one of the conditions of an amended system. Upon these terms the proprietors of the patent theatres would be no less gainers than the public by a surrender of their exclusive privileges, for there can be no doubt that the effect of the theatrical monopoly, like that of all other monopolies, has been to injure the interests of the monopolists themselves. It has prompted them to increase their theatres to a size adapted only to the representation of frivolous and unintellectual dramatic pieces. Hence the legitimate drama has been almost driven from the stage, and our national theatres are no longer upheld by the talents of distinguished men of letters, or by the patronage of the higher classes of society. Managers of theatres are mistaken if they suppose that dramatic pieces, on which the

greatest outlay of capital has been employed for external decorations, are the most attractive, and, by consequence, the most profitable. The size of their theatres may render such performances necessary; but it is the managers who have created this necessity, and not the public who have lost their taste for the genuine drama; it is the managers who have done all they can to vitiate the national taste, and who would then, like Lord Peter, persuade the public that the crust they are compelled to set before them, is most excellent mutton. In France, where we take theatrical property to be far more flourishing than in this country, and where, with the exception of the national Opera, which is an affair of the government, theatricals are for the most part conducted upon sound and rational principles, the outlay of capital with respect to external decoration in the most attractive pieces would, in most instances, be covered by the profits of a single night's performance. There are many provisions, which in improving the laws relating to the drama, we might advantageously borrow from the French code: that, for instance, which secures to dramatic authors, and to *their heirs or assigns* for a limited period, (h) not only the copyright of their works, but an interest in every representation of them that may take place, either in the capital or in the provincial theatres. This law is not only just as regards the claims of authors, but its adoption in this country would tend, perhaps, above any other provision that could be devised, to revive the spirit of our dramatic literature. The practice of levying door-money, as it is called, at the theatres, a per centage on each night's receipts in aid of paupers, might also perhaps be usefully introduced into this country: under due regulations it would make the burthen of the poor-rate fall less heavily on certain classes, and it seems reasonable that those who allow themselves the largest share of amusement, should contribute in the greatest proportion to the wants of their destitute countrymen. But we have already extended this article beyond the limits we had prescribed to ourselves, and we must close, for the present, our remarks on the subject of theatrical jurisprudence—a subject which, though it cannot be regarded as one of paramount importance, and though the evils and abuses connected with it cannot be numbered among those which call most immediately and urgently for reform, is nevertheless well deserving of the attention of the legislature.

(h) The period is limited to a term of 10 years after the author's death, with respect to his collateral heirs, or assigns; but his rights are continued to his widow, if she survive him, for life, and to their children for 20 years after the death of the survivor.

See the report of the French commission, recommending a farther extension of this term from 10 to 50 years, in the article on the French Law of Literary Property, p. 117 of this journal.

ART. VIII.—INSOLVENT COURT, AND RULES OF THE KING'S BENCH.

1. *Observations on the Insolvent Debtors' Act.* By William Jones, Esq. Marshal of the King's Bench. London, 1827.
2. *A Letter to William Jones, Esq. from Henry Dance, Provisional Assignee of Insolvent Debtors.* London, 1827.

Few circumstances could be more favorable to the progress of legal reform than that the inferior officers of our courts should fall together by the ears, quarrelling for their respective fees and emoluments; but it unfortunately happens that these functionaries have a strong innate perception of the danger of publicity: instinct tells them to beware of that light which the late Secretary of State, much to his honor, threatened to let into their holes and corners: therefore, though each views with exceeding jealousy the pickings of his brother, they seldom venture the hazardous experiment of a public fight for their crumbs. Knowing this propensity to secrecy, and knowing also, that the most prying eye of the uninitiated, unless assisted by King's evidence, would fail to penetrate all the recesses of office, we congratulated ourselves exceedingly on the appearance of Marshal Jones's *brochure* against the Insolvent Court; flattering ourselves that the keen sight of a rival officer would discover, and *jalousie de metier* expose, all the deformities of that excrescence of judicature. In a very great degree we have been disappointed: the gallant Marshal has rushed into the combat only half armed; and so imperfectly informed of the enemies' strength and tactics, that his first charge has utterly failed. It is true that the Insolvent Court called in a potent ally: they were not content to rest their safety on the valour of their champion, Mr. Dance; but invoked the assistance of majesty, in the shape of a criminal information. We were grievously displeased at this: a fair stand-up fight between Mr. Jones and Mr. Dance would have afforded the public much amusement; but the backers, seconds, and bottle-holders, appear to have thought that, in the unskilful use of their weapons, the combatants might possibly hurt their friends more than each other: it was therefore agreed that they should shake hands and be friends. Mr. Dance is to respect the secrets of the prison-house; and the Marshal is to suffer the Provisional Assignee, and his well-filled bag, to pass the gates of his fortress unquestioned and unexamined.

Since we are disappointed in our hope of detailing the fight, we must content ourselves with stating the preparations for it. The challenge came from the Marshal in the shape of Observations on

the Insolvent Debtor's Act, under which, it is said, 18,000 persons have been liberated—a dreadful statement ! which must go to the very heart of every gaoler in the kingdom !—requiring, however, the verification of Parliamentary Returns.

"It is only," says our author, "after such a return, made officially, and such a motion, that the charges and expenses of the Insolvent Debtors' Court, extravagant as relates to the country, and ruinous as affecting the interests of the debtor, can, with sufficient accuracy to answer the purposes of *serious* inquiry, be ascertained. When that return shall have been made, not only the actual cost upon each case may be obtained, (we doubt it,) but a faithful comparison made between the expenses attending the discharge of prisoners for debt under the existing act, and those which the country and the debtor were subjected to under the provisions of the occasional and temporary acts which were passed before the constitution of the present Court. * * * * In the first place, it is to be noticed that, about thirty years since, the late Sir Joseph Mawbey and the writer of these pages, as magistrates for the county of Surrey, discharged many hundred insolvents. * * * * At that period, the whole expense of the insolvent, for preparing to obtain his discharge, seldom exceeded a *guinea and a half*; hardly ever *two guineas*, which, with the Court-fees and all other expenses, seldom exceeded *three guineas*. A sum quite large enough for a man to pay, who had just given up his *all* upon oath."

We think so too ; but we are not equally satisfied that the cheap justice of Sir Joseph Mawbey, and his learned coadjutor, was of the very first quality : our experience teaches us to distrust such very great bargains : we would rather pay the fair market price for a good commodity that will wear well and look respectable, than be fobbed off with a thin, sleezey article, made up for the eye, but having no substance in it. We would rather pay Henry Revel Reynolds, and handsomely too, for doing his business well, than suffer a whole bench of magistrates, even in Surrey ! to botch it by their blundering. If, in the days of Sir Joseph Mawbey, we had heard any thing of dividends, we might have estimated his judicial administration of the Insolvent Law more highly ; but we do not find that the eulogist of those good old times adverts to such incidents ; nay, the name of creditor does not occur in the paragraphs from which we have extracted our quotation—a pardonable omission we admit, since a disregard to the interests of that class is a leading feature, both in the institution of the Insolvent Debtor's Court, and in the prison of the King's Bench.

We have now to turn to the alleged expenses of the existing system : these, we are told by the Marshal, amount to 25*l.* at least, for each prisoner's discharge, exclusive of the sums annually paid by the country for the Insolvent Court and its officers. The court fees, it is true, do not appear exorbitant : it is by accumulation that they become so. Thus it happens, in the creation of many new establishments, that an officer whose utmost ambition,

whose utmost pretention, would have been amply satisfied with three or five hundred a year, finds himself in possession of fifteen hundred or two thousand. The legislature, or the court, are of opinion, that 2s. 6d. or 6s. 8d. are very moderate remunerations for a particular duty; and so these sums might be, if the duties were of rare occurrence, and to be separately executed: but where the officer can pocket a hundred six and eight-pences in an hour, without exertion, mental or bodily, and that day after day, it becomes a public question whether such an office is not overpaid. But of this, unfortunately, the public hears nothing. If, indeed, the perquisites fall short, there is a grievous cry about unremunerated services: if any unnecessary branch of business is lopped off, there is a spirited remonstrance, or a clause for compensation: but, when the profits are three times as great as the legislature, the patron, or the holder of the office, ever intended or expected, not a word is said. The phenomenon of a conscience-stricken clerk, paying into the treasury the surplus of unmerited perquisites, has never yet occurred—perhaps, it never will. The clear policy, therefore, is, that Parliament should always fix a maximum of emoluments (as is now done in some cases), beyond which all profits should be paid into a common purse: thus, there would always be a fund out of which to compensate the notorious inadequacy of the remuneration in some few departments from the scandalously excessive profits of others. We do not believe, that either Marshal Jones or Mr. Dance would be peculiarly pleased with such a regulation: let them, however, console themselves with the assurance that we speak for the future: we are not advocates for making bag-foxes of some half-dozen subalterns, for the security of their more voracious principals. Having made this concession, we will, with the less difficulty, proceed to examine the charges of Mr. Jones and the defence of Mr. Dance:—

“There is,” says the Marshal, “an officer belonging to this Court, whose profits are said to be enormous, without being subject to any *risk* whatever, and that is the *Clerk of the Court*, who, if 80,000 prisoners have been discharged, has received no less than 10s. 6d. for each of them, which will amount to 9450*l.* in five years upon this fee alone, which is paid for nothing on earth but witnessing the petitions, and swearing the Insolvents to their schedules.”

“I (replies Mr. Dance) am the officer to whom you refer, “the fee which is paid me is not 10s. 6d. but 5*s.*, not for the duties, as stated by you.”
 • • • • • “but I receive it for preparing the provisional assignment”——
 “and for attending at the prison, when I witness his signature to his petition and estate papers, and afterwards file them in the Court. This is the only fee paid by an insolvent during the process towards his discharge, in which I have any interest, or which comes into my department of the office; there is one and only one other fee paid to the office of the Court by him during

that process, namely, 2s. 6d. for preparing the warrant of attorney," * * * *
 "All other matters done in the Court, in any way concerning a prisoner's discharge, are done without fee."

Now, it certainly happens, that the schedule of officer's fee, annexed to Mr. Warrand's edition of the Act, had induced us to draw a different conclusion :—

To the provisional assignee for attending at the prisons, to witness the signature of the petition, preparing provisional assignment, and bringing to, and filing the same at the office, each case	0	5	0
Office copies of proceedings, each folio	0	0	4
Warrant of Attorney to authorise the entering up judgment ..	0	2	6
For preparing the assignment from the provisional assignee to the assignees.....	0	7	6

Therefore, as to this latter charge, of which Mr. Dance makes no mention in his letter, Mr. Warrand, in his otherwise accurate work, is wrong ; or else, Mr. Jones's error consisted, substantially, in charging only 10s. 6d., when he should have rated the emoluments at 15s. ; for we conclude that the same officer prepares the assignment and provisional assignment ; and, as both are on printed forms, the execution of this duty is not very laborious.

As to the fee of 1*l*. for investigating the prisoners' accounts, we cannot but think that such a duty ought not to have been committed to the discretion of any inferior officer—the commissioners themselves should have been required to execute it : but of this we may have occasion to speak hereafter.

Viewing the Gazette (a) as the very worst mode of advertisement, we cannot omit noticing the " arrangement made with the Gazette printer for charging *only* three shillings for each ; which charge would be very much greater, if each insolvent should send for himself to the Gazette his own particular advertisement." Sect. 86 of the Act requires all printers and proprietors of newspapers to insert advertisements, directed by the Act, for three shillings : but the printer of the Gazette, who is no doubt a great man, has decided that the Act does not apply to him ; therefore, he may lump the advertisements at three shillings each, which the Times or Chronicle must insert severally :—this job could not have been contemplated, and the practice ought to be corrected. There can be only one defence of the practice, and then the ordinary papers should have the same privilege ; and that is, that separate adver-

(a) Most scandalous charges are said to be made at the Gazette Office for *expedition money*,—but who can contest a charge when the offices of the three Secretaries of State are interested in defending it?

tisements would inconveniently swell the size and price of the Gazette:—this we admit; but, if the reason is good, it applies yet more strongly to bankruptcy; in which department there being no limit of three shillings, the Gazette printer takes upon himself to insist on separate insertions for advertisements, (as of audit and dividend), which might conveniently, and ought to be united.

Mr. Dance does not think it necessary for *him* to justify the circuit expenses of the commissioners: these, according to the showing of the Marshal, appear to be enormous:—

	£	s.	d.
For advertising in the Gazette and country Newspapers notice of the commissioners at the several assize towns, &c. pursuant to sixth sec. of the 5th George 4, c. 61....	240	0	0
Sundry incidental expenses	80	0	0
To the expenses of three circuits, three times in the year 1826, viz.			
1st. To the Commissioners' travelling expenses, on an average of 800 miles, for each of such three circuits, at the rate of 3s. per mile. 7200 miles.....	1080	0	0
2d. To the Commissioners' subsistence, lodging, and expenses of themselves and one personal servant for each of them, on an average for seven weeks, for each of such three circuits, at the rate of 20l. per week, for each Commissioner	1260	0	0
3d. For the travelling expenses of three clerks, viz. one attendant on each Commissioner on his circuit, the number of miles as above, viz. 7,200 miles, at 1s. 6d. per mile....	540	0	0
4th. For subsistence and lodging of such clerks, for the like period at the rate of 1l. per diem.....	441	0	0
5th. The compensation to such clerks, for the like period, at the rate of 1l. per diem each clerk, in lieu of their salary, and share of fees at the office, during these periods, appropriated to pay extra clerks employed during their absence, and also as a remuneration for extra labour	441	0	0
6th. For contingent expenses on the said circuits, at the rate of 79l. 6s. 8d. for each time of making such three circuits....	238	0	0
	£4320	0	0
For Exchequer and Treasury fees (b) on the whole, say....	700	0	0
	£5020	0	0

Adding together, therefore, the salaries of the commissioners, which Mr. Jones underrates, the salaries of clerks, &c., the expenses of the establishment, the fees taken by its officers, the travelling expenses, and the charges created by its proceedings, it will be seen that the Insolvent Debtor's Court is no inconsiderable burden

(b) It is scarcely within our province to comment on this exorbitant charge of more than 3s. in the pound, for the expenses of paying 4320l.

to the country : if it shall hereafter be shown to us that any benefit arises from its jurisdiction which can compensate its charge, and what is yet more important, its demoralising effect on the country, we shall be happy to review our present opinion.

It is quite clear, however, that the remedy which the Marshal of the King's Bench has had the goodness to point out, will not cure the evil. An indiscriminate imprisonment of innocent and guilty debtors, for six months instead of fourteen days, is not likely to improve morality, stimulate industry, or clear the goals : it is infinitely more doubtful whether suffering prisoners to reside within the rules of the King's Bench, that is, to be prisoners by fiction of law, and to pay to the Marshal, for the privilege of such fiction, a larger percentage on their debts, by way of purchase of the rules, than they will ultimately divide among their creditors, would tend to the security of any interest or object except that which, from the concluding paragraph of his pamphlet, appears to have actuated the Marshal.

Here we must leave the belligerent functionaries, hoping, for the sake of the public, that they will soon afford us another opportunity of adverting to the use, practice, and emoluments of their offices.

PARLIAMENTARY PROCEEDINGS.

Few Sessions of Parliament have ever opened with brighter prospects to the legal reformer than that which has recently been closed. The highest authorities, both in the law and ministry, were pledged to various measures of improvement or alteration in the judicial system and establishment: the time was supposed to have arrived, when ancient abuses could no longer be defended on the score of their antiquity, and when a people, advancing more quickly than their rulers in the course of useful knowledge, would no longer tolerate the delays of the ignorant or interested advocates of an obsolete farrago, which it were an abuse of terms to miscall a system. If the uncertainty of political speculations required additional illustration, we should find it here: even at the moment of promised sunshine, when a Secretary of State had actually proposed "to let day-light" into all our courts, a storm arose from a quarter least expected; and when we then anticipated that the political breeze would clear away the ancient fog which had shrouded our legal tabernacles, a damp, dull, heavy cloud has come over us, bringing with it a chilling blight of our best formed expectations.

We were, and are, willing to make every due allowance for the peculiar political position of a hastily formed ministry: we agreed that the new administration ought not to be forced into premature contest on any great question, while its strength was yet unconsolidated; while its newly acquired friends were unaccustomed to their colours, and when future proselytes had not yet had time or opportunity to attorn gracefully. We, therefore, could have borne postponement with necessary patience; but that patience was destined to a severer trial. On the main question—Chancery Reform, then ripe for discussion, the bill on the table of the House of Commons, after having been read a first time, the second reading actually fixed to a day within a week of the first, by which the proposer and advocates of the measure must have been deemed to have pledged themselves, and in fact did pledge themselves, to the maturity of their plan, on this question so long in progress, so universally desired, so often discussed, so ripe for decision,—we were destined to hear not a simple postponement on the ground of pressure of more important business, not on the suggestion that, the principal and open enemies of the bill being then removed from power, it might be expedient to consider, whether the measure of

reform might not be made yet more full and perfect—No. We were told to doubt whether this long desired, this eternally discussed, this all but accomplished triumph of judicial reform, was *now* necessary or expedient. After having deprecated, as we have also deprecated, the idea of making the abuses and inefficiency of the Court of Chancery a ground of personal objection to the judge who presided over it, we were asked, by those who disavowed personality, to gulp down our opinion, that the vices were of the system, not of the man; and to try whether, under a new man, any reform would be necessary! This did, indeed, surpass our patience. With every respect for one of the learned persons alluded to—with every possible allowance for the extraordinary political position in which he found himself—we cannot reconcile ourselves to the course which he has, in this instance, recommended for adoption. Of the Attorney General's love of reform, we had formed no very high estimate: his speeches have excited our wonder, but have inflicted no disappointment: we look back to his parliamentary career without being able to trace a single improvement of the law to his presence in the legislature: we remember his opposition to the County Courts' Bill, his objections to increasing the salaries of the Puisne Judges, and his feeling lamentation on the reduction of the patronage of the Lord Chief Justice of the King's Bench. These things considered, we did not wonder that a *Nisi Prius* advocate should not be sensible to the abuses of Courts of Equity: we were not astonished that a partizan should abandon the general object of attack, when he had attained the post best fitted for his individual security: we did not identify our feelings with those of his Majesty's Attorney General, and felt no mortification at the triumphal shouts which the enemy set up on his defection from the cause of legal reform. From the senator who *could not see* how the abuse of extorting fees from acquitted defendants could be remedied, we expected nothing, and have not been disappointed: but it was otherwise when we thought ourselves abandoned by one whom we have never viewed as a mere lawyer; by one on whose wide range of intellect, on whose extensive and philosophical intelligence, united with a sufficient but not benumbing knowledge of practice, we had very mainly relied for the amendment of our system. We have the consolation to believe that the desertion, for such we must still call it, is merely temporary; we are willing even to believe that the postponement of the Chancery Bill was rather intended to afford time for reconciliation to a yet more effective and liberal reform, in the minds of those who might have something of the old leaven still clogging their intelligence, than as a permanent abandonment of the measure. "Let the new Chancellor try his powers on the old machine, with all its rusty cranks, its complicated counteractions, its petty expedients, its

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consumption of fuel, its waste of oil, its dirt, its filth, and its friction; let him try whether, with all his energy of character, with all his talent, with all his learning, he is able to force it into efficient action. If having tried the experiment for six months he must confess his failure," as we know he must do, "he will then be more willing" and we may add more able, "to institute a more effective measure of reform than that which, as Master of the Rolls, he was officially required to introduce." We should be content to adopt such an interpretation of the abandonment of the Chancery Bill; for we are satisfied of the inevitable result. What Lord Eldon, Lord Lyndhurst, and Sir John Leach could not effect, Lord Lyndhurst, Sir John Leach, and Sir Anthony Hart will never accomplish. The contrary proposition might be reduced into the form of an equation, in which Sir A. Hart would be made equal to as much more than Lord Eldon, as the powers of the new Court exceeded those of the old; a deduction which, without the slightest disrespect to his Honor the Vice Chancellor, we may pronounce to be absurd; but its absurdity is yet more glaring when we consider that the power of Sir John Leach in the first equation is, in truth, somewhat more than double his power in the second. That most efficient Judge, by his removal to the Rolls, has lost the opportunity of hastening the progress of business; as it must be obvious to every one conversant with the practice of both Courts, that matters are brought before the Vice Chancellor for argument, on motions, petitions, pleas, demurrers, &c. in those stages in which the peculiar quickness of Sir John Leach was pre-eminently useful. We do not in the least object to the comparative ease which his Honor has thus acquired by his change of office; his health may have required, as his services have deserved it; but as we cannot calculate, for obvious reasons, the increased power of the Lord Chancellor by change of position, in the same ratio as the decreased power of the Master of the Rolls, we must still protest against the conclusion that these judges can ever either reduce the present arrear, or master the future business of the Court of Chancery. Three angels, to adopt Mr. Shadwell's metaphor, could not do it under the existing system; for Masters, Registrars, Secretaries, Clerks, Draftsmen, Solicitors, would pluck their wings for goose quills rather than allow them the power of velocity.

The experiment is in fact already decided. Instead of having cleared off the arrear of old business, there is actually at this moment an accumulation of the new, and that also, although the number of suits instituted has materially fallen off. Those who look to the surface only will congratulate the country on this decrease of litigation, but those who examine deeper will find that the paucity of suits arises from the despair of obtaining justice.

The delays and abuses of the Court of Chancery have become so fearful, that prudent men will forego any right or suffer any wrong rather than be drawn within its vortex. In this state the country is destined to linger for some two or three years longer, unless indeed the popular voice should force upon parliament the consideration of a question which there appears to be a general disposition to avoid.

The question of reform in the administration of the Bankrupt Laws is also postponed: it was in truth Mr. Michael Angelo Taylor's unlucky motion, against which we had previously protested, which gave occasion to the speeches on the Chancery bill to which we have alluded. The City of London has printed the Report of their Committee on the Bankrupt Laws; but the Common Council, on the grounds of expense, declined petitioning Parliament for a reformation of the system. We shall examine hereafter Mr. Eden's short bill, and give an abstract of the fees received by the Lord Chancellor, the Patentee, and other officers from this branch of business.

It is pleasing to be able to turn from these disappointments to measures of a more satisfactory character. Mr. Peel retains on the opposition side of the house the same inclination to improve the laws of the country, which gained him the confidence of the people while a member of administration.

The three bills introduced by him for the amendment of the Criminal Law, of which we gave abstracts in our last number, (a) have, with several important alterations, received the royal assent. A fourth bill, under the auspices of the same Right Honorable Gentleman, has also passed into a law; and as some of its provisions bear immediate reference to alterations made in the former three, we shall furnish our readers with an abstract of it.

STATUTES PASSED IN THE LAST SESSION OF PARLIAMENT.

- CAP. 1. An Act for applying a Sum of Money for the Service of the Year 1827.
- CAP. 2. An Act for raising the Sum of 10,000,000*l.* by Exchequer Bills, for the Service of the Year 1827.
- CAP. 3. An Act to confirm an Order in Council, for allowing the Importation of Foreign Oats, Oatmeal, Rye, Pease and Beans; to indemnify all Persons who have advised or acted in the Execution of the same; and to permit the Importation of such Articles until the Fifteenth Day of February, 1827.

(a) Ante p. 133, et seq.

- CAP. 4. An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters.
- CAP. 5. An Act for the regulating of His Majesty's Royal Marine Forces while on shore.
- CAP. 6. An Act for granting to His Majesty Rates of Postage on the Conveyance of Letters and Packets to and from St. Domingo and Cuba.
- CAP. 7. An Act for continuing to His Majesty for One Year certain Duties on Personal Estates, Offices and Pensions in England, and also certain Duties on Sugar imported into the United Kingdom for the Service of the Year 1827.
- CAP. 8. An Act for more conveniently paying the Pensions of Widows of Officers of the Royal Marines.
- CAP. 9. An Act to repeal an Act of the 28th Year of His late Majesty, for the better Regulation of the Manufacture of Ounce Thread.
- CAP. 10. An Act to enable His Majesty to make further Provision for their Royal Highnesses the Duke and Duchess of Clarence.
- CAP. 11. (*Scotland.*) An Act to continue until the 25th Day of July, 1828, an Act of the 54th Year of His late Majesty, for rendering the Payment of Creditors more equal and expeditious in Scotland.
- CAP. 12. (*Ireland.*) An Act to amend an Act of the 1st Year of His present Majesty, for the Advance of Money for carrying on Public Works in Ireland.
- CAP. 13. An Act to Indemnify such Persons in the United Kingdom as have omitted to qualify themselves for Offices and Employments, and for extending the Time limited for those Purposes. (*Vide p. 243.*)
- CAP. 14. An Act for fixing, until the 25th day of March, 1828, the Rates of Subsistence to be paid to Inn-keepers and others on quartering Soldiers.
- CAP. 15. An Act for declaring the Law in relation to Bills of Exchange and Promissory Notes becoming payable on Good Friday or Christmas Day. (*Vide p. 146.*)
- CAP. 16. An Act for applying certain Monies for the Year 1827.
- CAP. 17. An Act to extend the Provisions of an Act made in the 57th Year of King George the Third, for regulating the Costs of certain Distresses.
- By this Statute distresses for Taxes, Rates, Tithes, &c. not exceeding 20*l.* are subjected to the provisions of 57 Geo. 3, c. 93. (*Vide p. 148.*)
- CAP. 18. An Act to prohibit the setting of Spring-Guns, Man-Traps, and other Engines calculated to destroy human Life, or inflict grievous bodily Harm. (*Vide p. 147.*)

CAP. 19. An Act to repeal an Act of the 6th Year of His present Majesty, for regulating Vessels carrying Passengers to Foreign Ports.

CAP. 20. (*Scotland.*) An Act to regulate the Prosecution of Fraudulent Bankrupts in Scotland. (*Vide p. 148.*)

CAP. 21. An Act to amend the Laws relating to the Duties of Postage in Great Britain and Ireland.

CAP. 22. (*Ireland.*) An Act to continue for one Year, and until the End of the next Session of Parliament, the Acts for the Relief of Insolvent Debtors in Ireland.

CAP. 23. (*Ireland.*) An Act to continue for one Year, and until the End of the next Session of Parliament, an Act of the 6th Year of His present Majesty, for providing for the repairing, maintaining, and keeping in repair, certain Roads and Bridges in Ireland.

CAP. 24. An Act to amend the Acts for regulating Turnpike Roads in England.

CAP. 25. An Act for the Relief of certain Spiritual Persons, and Patrons of Ecclesiastical Preferments, from certain Penalties; and rendering valid certain Bonds, Covenants, or other Assurances, for the Resignation of Ecclesiastical Preferments.

(If this Act had contained no more than its preamble expresses little or no objection could have been taken to it. But its provision goes much farther; by an *ex post facto* law it materially deteriorates the property of those, who with a view to the future provision of their families, and on the faith of the case of Fitch and the Bishop of London, decided in the House of Lords, have invested money in the purchase of advowsons: yet the Bill passed both Houses almost without discussion. Fitch and the Bishop of London was as much law as Fletcher and Lord Sondes was, till *confirmed* by this Act; nor have we heard the least reason from the advocates of the Bill (whose chosen motto is *stare decisis*,) why the former judgment is not as much entitled to legislative protection as the latter. The defect in the law, that there was no security that the person in whose favor the resignation is stipulated shall be presented, is remedied by the last section of the Act: this protection being provided, why was it necessary to declare such future resignation bonds as were within the meaning of Fitch and the Bishop of London to be illegal? We must revert to this subject.)

SECT. 1. Recites the Act 31 Eliz., c. 6.; and that *it has lately been* adjudged and determined at law, that such engagements as aforesaid come within the intent and meaning of the said recited Act.

SECT. 2. All resignation bonds entered into before 9th April, 1827, valid.

SECT. 3. Engagements not *bona fide* made, not within this Act; and "*nothing* herein contained shall be deemed *compulsory* upon the ordinary to accept the resignation!

SECT. 4. If the person so specially named be not presented to such spiritual office within six months, the resignation shall be void.

SECT. 5. Nothing to extend to proceedings commenced before the 9th of April, 1827.

CAP. 26. (*Ireland.*) Tithes of the Parish of Youghall.

CAP. 27. *An Act for repealing various Statutes in England relative to the Benefit of Clergy, and to Larceny and other Offences connected therewith, and to Malicious Injuries to Property, and to Remedies against the Hundred.*

This statute, which may be denominated the pioneering act, repeals 138 statutes wholly or in part.

CAP. 28. *An Act for further improving the Administration of Justice in Criminal Cases in England, &c. &c. &c.*

After stating in the preamble,—heaven knows how truly! that "trials for criminal offences in England are attended with some forms which frequently impede the due administration of justice," it enacts:—

SECT. 1. That a plea of "*Not guilty*," without any farther form, shall put the prisoner on his trial by jury.

SECT. 2. If the prisoner stands mute of malice, or does not answer directly, a plea of "*Not guilty*" may be entered.

SECT. 3. Every challenge beyond the legal number shall be void.

SECT. 4. Attainder for another crime not pleadable in bar.

SECT. 5. The jury shall not inquire of prisoner's lands, &c. nor whether he fled.

SECT. 6. Benefit of clergy abolished.

SECT. 7. What felonies only shall be capital.

SECT. 8. Felonies not capital punishable under the Acts relating thereto;—otherwise punishable under this Act with transportation for seven years, or two years' imprisonment with whipping.

SECT. 9. In case of imprisonment the court may order hard labour, or solitary confinement.

SECT. 10. If a person under sentence for another crime is convicted of felony, the court may pass a second sentence, to commence at the expiration of the first.

SECT. 11. Upon a second conviction for any felony, not punishable with death, the convict punishable with transportation for life, or four years' imprisonment, &c. Form of indictment. Certificate by the officer of the court sufficient evidence of a

former conviction. Uttering a false certificate punishable with transportation for seven years, &c.

SECT. 12. Admiralty offences punishable as if committed on land.

SECT. 13. A free or conditional pardon under the sign manual to have the effect of a pardon under the great seal;—not however to affect a subsequent conviction.

SECT. 14. Any statute relating to offences, in which the singular number or masculine gender alone is used, shall “be understood to include several matters, as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals,” unless otherwise provided or repugnant to the context; and forfeitures payable to a party shall be payable to a body corporate.

SECT. 15. Commencement of this Act.

SECT. 16. Not to extend to Scotland or Ireland.

The above Act, which may be considered as a supplement to 7 Geo. 4, c. 64, is highly creditable to its framers, and proves the progress made, even in the course of a year, by sound principles of legislation. The abolition of that stupid relic of barbarism, “Benefit of Clergy,” and other useless forms, may be regarded by superficial observers as changes of little importance. Knowing, however, that in law as well as religion, superstition clings with greater tenacity to words and unmeaning formalities than even to substances, we are disposed to view such amendments as a strong indication of the workings of an improved and enlightened spirit. But, besides this triumph over mere absurdity, the number of substantial reforms effected by the Act is far from inconsiderable. The 2d and 3d sections are much more “to the honour of our laws,” than the 12 Geo. 3, c. 20, (re-enacted as to clergyable felonies by 7 Geo. 4, c. 64), which substituted conviction for the *peine forte et dure*. The removal, too, of various technical obstacles to the administration of justice is a solid improvement. The 14th section, penned by Sir James Richardson, operates in this manner. It may appear surprising that it should have required the aid of an ex-judge, in the year 1827, to draw up so simple a clause for the general interpretation of criminal statutes; but if we examine the interpretation clause of Mr. Peel’s Larceny Bill, (b) as it stood for the second reading, we shall be forced to

(b) The following is a specimen of this concise clause, as it stood in the Larceny Bill, and in the “Malicious Injuries” Bill.

“And in order to remove doubts as to the meaning of certain words in this Act, be it enacted, that the

words ‘Person,’ ‘Party,’ ‘Offender,’ ‘Owner,’ ‘Plaintiff,’ and ‘Defendant,’ shall each be deemed to include any number of persons, parties, offenders, owners, plaintiffs, or defendants, and of either sex; and that the word ‘Master,’ shall be deemed to include

conclude, that the difficulty of avoiding an outpouring of words in legislation is by no means imaginary. In conclusion, we wish we could say, that this Act abolishes *all the forms* that impeded the due administration of justice.

CAP. 29. *An Act for consolidating and amending the Laws in England relative to Larceny, and other Offences connected therewith.*

This Bill has, in the course of its progress, undergone considerable purification. Some obscurities, and many redundancies of expression, have been removed; and, upon the whole, the language has been rendered, if not strictly classical, at least as perspicuous as a lingering attachment to legislative prolixity would admit.

Three new clauses have been added:—the first, (sect. 65.) prescribing the mode of compelling the appearance of persons punishable on summary conviction; the second, (sect. 69.) empowering the King to pardon persons imprisoned under the Act, although for non-payment of money to “some party other than the Crown;” and the third, (sect. 77.) extending the Act to offences committed within the jurisdiction of the Admiralty. That part of sect. 3, which provided for the punishment of persons convicted a second time under this Act, and the whole of the clause for the interpretation of the Act, being rendered unnecessary by the general provisions (sect. 11, 14.) of 7 and 8 Geo. 4, c. 28, are expunged. The stealing of records, &c. (sect. 21.) which, in the draft of the Bill, was declared to be felony, is now made a misdemeanor, punishable with transportation for seven years. Obtaining goods by false pretences, with intent to cheat or steal, (sect. 53.) which was made larceny in the draft of the Bill, (sect. 55.) is pronounced to be a misdemeanor, punishable with transportation for seven years; and it is provided that if, upon an indictment for such misdemeanor, it should be proved that the offence amounts to larceny, the offender shall not be entitled to an acquittal of the misdemeanor; nor shall he be liable to be afterwards prosecuted for larceny upon the same facts. The whole of this clause is wondrously improved. The anomaly of subjecting a receiver of goods, the taking of which is a misdemeanor, to a more

any number of persons in that relation, and of either sex; and that the word ‘Servant’ shall be deemed to include any clerk, apprentice, or other servant, either male or female, although the same may be subsequently referred to in the singular number or masculine gender only; and that whenever the subject mat-

ter, on or with respect to which any offence shall be committed, is expressed or referred to, whether for value, or for any other purpose whatever, in the singular number, it shall be deemed to include any number of the same matters.”—Ohe! jam satis est.

ignominious punishment than the taker, still continues (sect. 55). The scale of imprisonment, upon non-payment of the penalty in cases of summary conviction, has been altered. The term is now limited to two months, where the penalty does not exceed five pounds; to four months, where it does not exceed ten pounds; and to six months for any larger sum.

In our last number, (c) we pointed out the effect which the 2d section, abolishing the distinction between grand and petty larceny, would have upon the law of evidence. The 31 Geo. 3, c. 35, has been since expressly repealed; and we indulge a hope that, as the framers of the Larceny Act have had their attention thus forcibly drawn to the point, the whole law of disqualification will shortly undergo a revision.

CAP. 30. *An Act for consolidating and amending the Laws in England relative to Malicious Injuries to Property.*

This Bill has likewise been pruned of many ugly excrescences. The three new clauses inserted in the Larceny Bill, and the alteration of the scale of imprisonment for non-payment of penalties, are also introduced into that which relates to malicious injuries. The other material alterations in this latter are, the making the destruction of turnpike gates, &c. a misdemeanor, instead of felony; and the drawing a distinction between firing a stack of corn, &c., and firing a standing crop or plantation. In the draft of the Bill both these offences were made felonies, punishable with *death*: in the Bill, as it now stands, the latter offence is declared to be felony, punishable with *seven years' transportation*.

CAP. 31. *An Act for consolidating and amending the Laws in England relative to Remedies against the Hundred.*

The only important change effected in this Bill is, that the sections 3 and 4 of the draft are expunged; and that a clause is introduced, specifying certain conditions with which persons damnified must comply to entitle them to their remedy. (Vide ante. p. 139.)

CAP. 32. (*Ireland.*) An Act to explain and amend an Act passed in the 7th Year of the Reign of His present Majesty, intituled, "An Act to prevent the Wilful and Malicious Destruction of Dwelling-Houses."

CAP. 33. An Act for the further Regulation of the General Penitentiary at Millbank.

CAP. 34. (*Ireland.*) An Act to amend the Acts relating to the Provision of Ministers in Cities and Corporate Towns in Ireland.

CAP. 35. An Act for the further Improvement of the Road from London to Holyhead, and of the Road from London to Liverpool.

CAP. 36. (*Ireland.*) An Act to continue, until the first Day of January, 1828, and from thence until the End of the next Session of Parliament, an Act passed in the 6th Year of the Reign of His present Majesty, respecting deserted Children in Ireland.

CAP. 37. An Act to make further Regulations for preventing corrupt Practices at Elections of Members to serve in Parliament, and for diminishing the Expense of such Elections.

SECT. 1. Persons employed by candidates to be disqualified from voting.

SECT. 2. Cockades and ribbons not to be given by candidates.

SECT. 3. Penalty of giving cockades, &c. 10l. (d).

SECT. 4. Not to extend to Scotland.

SECT. 5. Voters exempt from serving as constables during elections.

CAP. 38. An Act for discontinuing certain Presentments by Constables.

Presentments by constables, respecting Popish recusants, persons absenting themselves from their parish church, or any other place of religious worship, rogues and vagabonds, inmates, retailers of brandy, imposers, forestallers, regraters, profane swearers and cursers, servants out of service, felonies and robberies, unlicensed and disorderly ale-houses, false weights and measures, highways and bridges, riots, routs, and unlawful assemblies, and whether the poor are well provided for, and the constables are legally chosen and sworn, to be discontinued.

CAP. 39. An Act to repeal such Parts of two Acts of King William and Queen Mary, and of King George the Second, as relate to the settling the Rates of the Carriage of Goods.

CAP. 40. An Act to continue until the 10th Day of October, 1830, an Act relating to Duties of Excise on Crown, Flint, and Phial Glass; and to alter certain Laws of Excise relating to Flint Glass.

CAP. 41. An Act for raising the Sum of 13,800,000, by Exchequer Bills, for the Service of the Year 1827.

CAP. 42. An Act for granting and applying certain Sums of Money for the Service of the Year 1827.

CAP. 43. (*Ireland.*) An Act to consolidate and amend the Laws in force, in Ireland, for Unions and Divisions of Parishes;

(d) Mr. Williams, to whose "Accurate Abstract" we are indebted for much assistance in this compilation,

remarks that this provision will be of little avail, as no provision is made for Costs.

and for uniting or disappropriating appropriate Parishes, or Parts of Parishes; and to make further Provisions with respect to the erecting of Chapels of Ease, and making Perpetual Cures.

CAP. 44. (*Ireland.*) An Act to provide for the Payment of a Salary (in lieu of Fees,) to the Judge of the Prerogative Court of Faculties in Ireland.

CAP. 45. An Act to allow, until the 24th Day of October, 1827, the Inrolment of certain Articles of Clerkship, and Assignments thereof.

CAP. 46. (*Scotland.*) An Act for the better enabling the Commissioners, appointed by an Act passed in the 3d Year of His present Majesty, to complete the Buildings of His Majesty's General Register House at Edinburgh.

CAP. 47. An Act for the further Extension of the Powers of the several Acts authorising Advances for carrying on Public Works.

CAP. 48. An Act to continue, until the 1st Day of June, 1828, and from thence to the End of the then next Session of Parliament, an Act of the 3d Year of His present Majesty, for regulating the Manner of licencing Ale-houses in England.

(The Bill of which we gave an abstract, p. 149, was abandoned.)

CAP. 49. An Act to exempt Persons who have procured Game Certificates in Great Britain from the Duty on Game Certificates in Ireland, and to authorise Persons who have paid Duty on Game Certificates in Ireland to kill Game in Great Britain, upon paying the additional Duty only.

CAP. 50. An Act to defray the Charge of the Pay, Clothing, and contingent and other Expences of the disembodied Militia in Great Britain and Ireland; and to grant Allowances in certain Cases, to Subaltern Officers, Adjutants, Quarter Masters, Surgeons, Assistant Surgeons, Surgeons' Mates, and Serjeant Majors of Militia, until the 25th Day of March, 1828.

CAP. 51. (*Ireland.*) An Act for further amending an Act, passed in the 4th Year of His present Majesty's Reign, for the better Administration of Justice on the Equity Side of the Exchequer, in Ireland.

CAP. 52. An Act to consolidate and amend certain Laws relating to the Revenue of Excise on Malt made in the United Kingdom, and for amending the Laws relating to Brewers in Ireland, and to the Allowance in respect of the Malt Duty on Spirits made in Scotland and Ireland from Malt only.

(In the course of the discussion of this Bill, some observations were made on the hardship of the Excise Law, as preventing the steeping of grain for food for horses, &c.; when the

Secretary of the Treasury, though he refused to insert any clause legalising the practice, promised that instructions should be given to the officers to permit it unmolested.)

CAP. 53. An Act to consolidate and amend the Laws relating to the Collection and Management of the Revenue of Excise throughout Great Britain and Ireland.

CAP. 54. An Act to carry into Effect the Treaty with Sweden relative to the Slave Trade.

CAP. 55. An Act to consolidate the Board of Stamps in Great Britain and Ireland.

CAP. 56. An Act to amend the Laws relating to the Customs.

CAP. 57. An Act to permit, until the first Day of May, 1828, certain Corn, Meal, and Flour to be entered for Home Consumption.

CAP. 58. An Act to make Provision for ascertaining from Time to Time the Average Prices of British Corn.

CAP. 59. (*Ireland*.) An Act for the further amending the Laws for the Recovery of Small Debts, and the Proceedings for that Purpose in the Manor Courts in Ireland.

CAP. 60. (*Ireland*.) An Act to amend the Acts for the establishing of Compositions for Tithes in Ireland.

CAP. 61. (*Ireland*.) An Act to amend the Laws for the Regulation of the Butter Trade in Ireland.

CAP. 62. (*Canada*.) An Act to authorise the Sale of a Part of the Clergy Reserves in the Provinces of Upper and Lower Canada.

CAP. 63. An Act to explain so much of an Act of the present Session of Parliament, for punishing Mutiny and Desertion, as relates to the Transportation of Offenders.

CAP. 64. An Act to establish a Taxation of Costs on Private Bills in the House of Lords.

SECT. 1. On application made to the Clerk of the Parliaments, as to the costs and expenses of private bills, he shall direct the same to be taxed by such persons as *he* shall appoint!

(He may appoint one of the officers of the House, most interested in maintaining the charges, and then by—)

SECT. 2. In actions against persons liable to pay the costs, the certificate [of such officer] shall have the effect of a warrant to confess judgment.

SECT. 3. Taxators to have power to administer oaths, and to require vouchers for all monies charged by parliamentary agents.

SECT. 4. Clerk of the Parliaments to prepare a list of charges to be allowed to parliamentary agents.

(Considering that the Masters in Chancery, who ought to be conversant with the Taxation of Costs, are already officers

of the House, it seems extraordinary that the duty was not confided to them, rather than to some person *unknown*, to be appointed by the Clerk of the Parliaments or Clerk Assistant.)

CAP. 65. An Act to explain and remove Doubts touching the Admiralty.

CAP. 66. An Act to extend an Act of the 56th Year of the Reign of His late Majesty, for enabling His Majesty to grant small Portions of Land as Sites for Public Buildings, or to be used as Cemeteries.

CAP. 67. (*Ireland.*) An Act for the better Administration of Justice at the holding of Petty Sessions by the Justices of the Peace in Ireland.

CAP. 68. (*Ireland.*) An Act for the Management and Improvement of the Land Revenues of the Crown in Ireland, and for other Purposes relating thereto.

CAP. 69. (*Ireland.*) An Act to provide for the Relief of Persons aggrieved by unlawful or excessive Distresses in Ireland.

CAP. 70. An Act for enabling His Majesty to raise 500,000*l.* by Exchequer Bills, and for appropriating the Supplies granted in this Session of Parliament.

CAP. 71. An Act to prevent Arrests upon Mesne Process when the Debt or Cause of Action is under Twenty Pounds; and to regulate the Practice of Arrests.

SECT. 1. No person to be held to special bail, or any special original to be served on the person; where the cause of action is less than 20*l.*

SECT. 2. Defendant discharged from arrest upon making deposit with the Sheriff, may, instead of perfecting special bail, allow deposit to be paid into court; or if he remains in custody, or gives bail to the Sheriff, he may pay the debt into court, with 20*l.* to answer costs, and file common bail.

SECT. 3. Defendant may receive such deposits out of court, upon perfecting special bail.

SECT. 4. Summons in the following form to be personally served on defendant.

C. D. [naming the defendant,] You are served with this process at the suit of A. B. [naming the plaintiff or plaintiffs,] to the intent that you may appear by your Attorney in His Majesty's Court of _____ at Westminster, at the return hereof, being the _____ day of _____ in order to your defence in this action; and take notice, that in default of your appearance, the said A. B. will cause an appearance to be entered for you, and proceed thereon as if you had yourself appeared by your Attorney.

But if it shall appear to the court or to a judge in vacation that the defendant could not be personally served then a *distringas* may issue:—

In the court of _____ between A. B. plaintiff, and C. D. defendant. [naming the parties.] Take notice that I have this day distrained upon your goods and chattels for the sum of Forty Shillings, in consequence of your not having appeared by your Attorney in the said court, at the return of a writ of _____ returnable there on the _____ day of _____; and that in default of your appearing to the present writ of *distringas* at the return thereof, being the _____ day of _____ the said A. B. will cause an appearance to be entered for you and proceed thereon, as if you had yourself appeared by your Attorney.

E. F. [the name of the Sheriff's officer.]

To C. D. the above named defendant.

Upon affidavit of the execution of such *distringas* (to be filed *gratis*) plaintiff may enter a common appearance.

SECT. 6. From August 1, 1827, the provisions of 19 Geo. 3, c. 70, extended to actions for higher sums, (to 20*l.*) and in Chester, Lancaster, and in Durham.

SECT. 7. No person to be held to special bail on mesne process, in actions under 50*l.* issuing from the courts of Westminster.

SECT. 8. Sheriff not to execute process, unless the writs be delivered by an Attorney, &c., and endorsed with his name and place of abode.

SECT. 9. Warrants, &c. contrary hereto to be void, but nothing to extend (*query*, why not?) to any writ or process sued out by any attorney, solicitor, clerk of court, or other officer of any court, having authority to sue out process in his own name.

SECT. 10. Not to extend to Scotland or Ireland.

CAP. 72. An Act to amend the Acts for building and promoting the building of additional Churches in populous Parishes.

CAP. 73. An Act to continue, until the 31st Day of Dec. 1829, an Act of the 4th Year of His present Majesty, for the better Administration of Justice in New South Wales and Van Dieman's Land.

CAP. 74. An Act to carry into Execution a Convention between His Majesty and the Emperor of Brazil, for the Regulation and final Abolition of the African Slave Trade.

CAP. 75. An Act to appoint Commissioners for carrying into Execution several Acts, granting Aid to His Majesty by a Land Tax to be raised in Great Britain, and continuing to His Majesty certain Duties on Personal Estates, Offices, and Pensions in England.

PARLIAMENTARY PAPERS.

A Return of the Sums received in the Office of Lord Thurlow the Patentee for the Execution of the Bankrupt Laws.

Gross Sum received in the Office.				Net Sum received by Lord Thurlow.			
	£	s.	d.		£	s.	d.
1811	13,424	2	9	.....	8,995	5	11
1812	11,865	14	8	.....	7,957	11	1½
1813	10,292	0	4	.....	6,674	3	6
1814	8,762	17	8	.....	5,828	6	4
1815	12,413	4	5	.....	8,730	1	0
1816	14,800	15	9	.....	10,765	15	3
1817	10,512	8	1	.....	7,067	5	3
1818	6,841	0	7	.....	4,637	14	6
1819	11,133	0	2	.....	7,951	19	11
1820	9,153	17	0	.....	6,414	7	9
1821	8,689	18	2	.....	6,048	4	7
1822	7,773	15	10	.....	5,338	9	11
1823	6,921	4	8	.....	4,681	10	9
1824	6,877	17	0	.....	4,678	9	7
1825	7,797	2	9	.....	5,618	6	4
1826	16,805	12	11	.....	13,268	19	5
<hr/> Total in 16 years 164,066 12 11				<hr/> 114,656 11 1½			

Average to the Patentee £7,165 a Year.

There is besides paid to the Lord Chancellor's Purse Bearer £2 on each Private Seal, which, in sixteen years, must have amounted to £23,298, exclusive of fees on supersedeas, &c.

An Account of the Fees received in the Office of the Lord Chancellor's Secretary of Bankrupts, from April, 1815, to April, 1827, (12 years.)

Total Received.			By the Chancellor.			By the Secretary.			By the Under Secretary and Clerks.		
£	s.	d.	£	s.	d.	£	s.	d.	£	s.	d.
93,436	4	0	43,470	19	0	22,678	7	10	27,293	4	0
<hr/>											
Average, 7,786	7	0	3,622	12	6	1,889	17	0	2,274	9	8

An Account of Fees received by the Lord Chancellor's Purse Bearer from 1811 to 1827.

Total.....£29,298 19 0

The Chancellor out of this receives 2s. for each Docket, and 17s. 6d. for each Private Seal. The Cheff Wax receives 10s., the Sealer 7s. 6d., and the Gentlemen of the Chamber 5s. out of every £2.

Mr. Hand, the late Lord Chancellor's Purse Bearer, concludes his return as follows:—

“ The total average annual amount of the emoluments of the office of Chancellor (including the fees received in the House of Lords) has been, for the twelve years since the payment of £2,500 per annum to the account of the Vice Chancellor, and the allowance of fees (formerly accounted for to the Great Seal) for payment of the Deputy Secretary and Clerks in the Bankrupt Office—£14,676.”

It appears, from the above returns, that the system of sealing a separate commission on each failure costs the country, out of bankrupts' estates, very considerably more than £11,700 a year; for, to these office charges are to be added the expenses of solicitors attending in the various stages through which a petitioning creditor is forced to pass before he obtains his commission. The whole charge of the patentee and his officers, and a very considerable portion of the other expenses, might be saved by giving to a competent court a general jurisdiction over bankrupts similar to that possessed by the Insolvent Court.

A Return of the Number of Debtors committed to, and discharged from, the King's Bench, Fleet, Horsemonger Lane, and Whitecross Street Prisons, in each Month of the Year 1826.

	King's Bench.			Fleet.			Horsemonger Lane.		Whitecross Street.	
	Committed.	Discharged.	Rules.	Committed.	Discharged.	Rules.	Committed.	Discharged.	Committed.	Discharged.
January..	240	138	The Marshal has made no Return of the number in the Rules.	72	56	2	79	65	282	193
February	179	217		81	70	8	78	82	272	292
March ..	74	136		24	41	3	68	75	298	265
April ..	306	186		190	58	20	87	65	256	306
May....	157	185		74	66	16	105	87	323	334
June ...	129	226		73	98	6	87	101	272	333
July....	32	177		6	97	1	92	109	259	355
August ..	48	81		14	39	1	101	74	282	251
Sept....	46	72		24	24	1	108	107	287	291
October..	103	35		40	10	2	126	104	333	210
Nov....	526	217		264	40	16	—	—	369	321
Dec.....	53	138		30	67	2	—	—	206	248

Total in Prison on the 15th of November, 1826:—King's Bench, 852. Fleet, 360. Horsemonger Lane, 1,051. (a) Whitecross Street, 526.

Number of Prisoners who have died in the Year 1826:—King's Bench, 25. Fleet, 7. Horsemonger Lane, 1. Whitecross Street, 11.

(a) Aggregate Number.

PROCEEDINGS BEFORE MAGISTRATES.

IN our first number we reported that a rule had been moved for against a Magistrate of the county of Stafford and another, to shew cause why a criminal information should not be filed against them, for having illegally, corruptly, and oppressively conducted themselves; the one by causing to be committed, and the other by committing to prison two children, a brother and sister, of the age of ten and seven years. On the 10th of May last, cause was shown against the rule; when, after hearing counsel and affidavits on all sides, Lord TENTERDEN said,

"It was the opinion of the Court that, although there was much to blame in the conduct of Mr. Broughton, yet, upon the whole, there was not enough to fix upon him the imputation of having acted from corrupt and malicious motives. Certainly, considering the age and the circumstances under which these children were brought before him, a discreet and a commonly humane man might reasonably be induced to pause before he committed such tender infants to a common gaol. There was another part of the conduct of this gentleman which the Court could not too strongly reprobate; namely that of having taken the deposition of Barlow, the prosecutor, in privacy, behind the back of the persons accused. For this conduct there could be no excuse, because all the parties might have been brought together in his presence. There was another circumstance also, which deserved animadversion; namely, that the deposition of Barlow professed to be taken in the presence of the prisoners, the fact not being so. Corrupt motives were distinctly denied on the part of Mr. Broughton; but although the Court were of opinion that the rule ought to be discharged as against him, yet, under all the circumstances, it could only be discharged on payment of costs. It was for the prosecutor to say, whether he wished to press the rule against the other defendant.

"Mr. CAMPBELL said, he was certainly instructed to press for the rule being made absolute against Barlow.

"Lord TENTERDEN said, that the rule must be made absolute then against Barlow. There were two material facts against him, which had not been denied, namely, one with respect to the goose, and the other the attempt to extort a confession from the boy.

"Rule absolute against Barlow, and discharged as against Mr. Broughton, upon payment of costs."

The readers will see in the sequel how this misplaced lenity, as we think it, of the Court of King's Bench was received by the magistrate; for we are enabled to lay before them the result of an action brought against Barlow; and, though the report of the trial may a little interfere with our chronological arrangement, we now insert it, because we consider the subject to be one of paramount importance. Few cases have ever furnished a more pregnant comment upon that doctrine of magisterial irresponsibility which the judges are in the habit of inculcating. We copy the report from the "*Morning Chronicle*."

"OXFORD CIRCUIT.—STAFFORD, August 8.

"MALICIOUS PROSECUTION.—*Caddy v. Barlow*.—This was an action brought by the next of kin to Julia Caddy, a child aged eight years, to recover compensation in damages from the defendant, for having maliciously caused her to be imprisoned in the County Gaol, and brought to trial, on a charge of stealing certain ducks belonging to him.

"Mr. CAMPBELL stated the case, and dwelt with great force and eloquence on the cruelty of subjecting so young a child to the degradation and debasement of a prison, even if she were guilty; but when, as he should show, the commitment was from malice, and without probable cause, how much greater would that cruelty appear. The child, at the time of her being sent to gaol on a charge of felony, was only seven years old, an age at which, it could scarcely be supposed, in most instances, to have attained to that degree of moral perception which it was indispensably necessary it should be possessed of, in order to give to any act of which it might be guilty the deep dye of felony. The Learned Counsel, after some further remarks, proceeded to state the case as afterwards proved by the following witnesses:—

"Mr. Keene, the Deputy Clerk of the Peace, produced the information sworn by the defendant before the Rev. Mr. Broughton.

"John Caddy, brother to Julia, the plaintiff, said he was 11 years old. In October, 1826, his mother went out after dinner, leaving him and Julia at home: they inhabit a cottage near the defendant's farm; after dinner he went with his sister and opened the defendant's pig-stye, and let out the pig upon the common; he had been desired to do so by the defendant; his sister and him then went to the pond on the common, to catch a duck belonging to their mother, which was swimming there; he pulled off his clothes, and his sister pulled off her shoes and stockings, and they then went into the water; he caught two ducks and his sister caught one; the one his sister caught was their own one; they were going to make them fight when the defendant came up, and shouted out; there was another man with him; the man caught hold of his sister, but the defendant called out, "Let her go and catch the boy, and I'll give you a dinner and a jug of ale." Witness was alarmed, and, expecting to be beat, ran off as fast as he could, and got home and crept under the stairs, and hid himself; the man arrived soon after, and told witness's mother (who was then at home) that he wanted witness for catching the ducks; witness's mother said she would bring him before Mr. Barlow, and the man went away; his mother fetched his clothes and took him before Mr. Barlow; Mr. Barlow said, "well, shall we beat him or roast him?" By "roasting" he meant fastening witness with a cord to the grate; he had served him so before; witness's mother said "no, beat him;" Mr. Barlow paused a "big while," and then said "no, I'll take him before a Magistrate. He shall go before Mr. Broughton." They then went to Mr. Broughton's, which is a distance of about two miles; Mr. Barlow told Mr. Broughton he had caught witness and a girl stealing his ducks; Mr. Broughton asked where the girl was? and being told she was not there, said to Mr. Barlow, "Then you must bring her in the morning, and I'll then examine into the case." Mr. Barlow asked for a warrant to break open the house and take witness's sister, but witness's mother replied, "No, I brought the boy voluntarily, and I'll bring the girl without a warrant." No warrant was granted. They then left the Justice's, and witness was taken by Mr. Barlow and put to sleep in a barn along with a man named Gregg; about midnight Mr. Barlow came into the barn with a lantern and a rope, and awoke witness, and threatened to hang him if he did not confess that his

father set him on to steal the ducks. He replied, "We were not going to steal them; we were going to fight them." He poked the cord in witness's face, and witness poked it back. He then left him. The next morning, witness, his sister and his mother, and Mr. Barlow, went before Mr. Broughton. Mr. Barlow and his witness went in before the Magistrate, leaving him and his mother and sister in the passage. After a time, they were called in, and Mr. Broughton asked witness what he had to say? and he told him they were fighting the ducks. The Magistrate would not believe him, but said he should send him and his sister to prison. Witness's mother cried very much. They were sent to prison, and remained there ten days, when they were brought to trial and acquitted.

"Cross-examined: My father's duck was a dark one; it was not a white duck my sister had got; when I got home, our duck was in the garden: it had time to get home, because I was obliged to go round by the lane: I never told Peake I did not care a curse what they did to me.

"Mr. J. Peake was in the presence of the Magistrate when the charge was made. Mr. Barlow said the boy, assisted by a girl, had been stealing his ducks, and Mr. Broughton said the case must stand over till the girl was produced. Mr. Barlow asked for a warrant, but the boy's mother said it was not necessary, she had brought forward the boy voluntarily, and she would bring the girl.

"Mr. Flint: Is attorney for this prosecution. After the action was brought he met the defendant, and told him that he had better give the poor people some compensation, and that if he would bring any respectable friend of his down to witness's house, he would undertake for the plaintiff that the sum that friend should think a fair compensation should be accepted, and the action discontinued. The defendant said he would do so, and the following Saturday was fixed, but the defendant did not come, and in consequence witness wrote to him, but he took no notice of the letter. [Witness produced a copy of the record of the plaintiff's acquittal.]

"Cross-examined: The affidavit produced, which states, that the copy of the record was necessary for the setting forth the proceedings under a criminal information then pending against Mr. Broughton and Mr. Barlow, in the King's Bench was written with his knowledge and consent. The proceedings upon that information have been since abandoned.

"Mary Caddy, sister of the plaintiff deposed, that when the man came to take her brother prisoner for catching their ducks, her mother said he had been sent to fetch the ducks, but that if he had done wrong she would bring him down to Mr. Barlow's.

"John Warner deposed, that a short time previously a goose, belonging to the plaintiff, was killed by the defendant, because it trespassed in his garden, and taken and flung into the plaintiff's back yard.

"James Nicholls proved, that another time the plaintiff's boy was charged with theft, because he picked up some pears that fell from a tree of the defendant's into the road.

"Mr. TALFORD, for the defendant, said, the proceedings adopted in this case were intended to harass and ruin his unfortunate client, who had been first dragged into the King's Bench by a criminal information, and put to enormous expense, and was now brought here on a civil action. His client had acted from a sincere belief that a felony was intended, and not from any malicious motive, as he should prove by the witnesses he should call before them. If, however, he should unfortunately not succeed in making out his defence so clearly as he expected to do, he trusted the Jury would take into consideration the cruel manner in which he had been already harassed, and give to the plaintiff one farthing only for damages.

" Mr. Weaver, clerk to Mr. Seckerson, attorney for the defence, said, that after the order had been obtained from the Magistrates, permitting the plaintiff to have a copy of the record of acquittal [he applied to have that order rescinded], on the ground that it was intended to be used in this cause, and not for sustaining the criminal information ; but the Magistrates refused, but at the same time said, that if it were so used, they should consider it as a fraud upon them.

" John Barlow, son of the defendant, said he was present at the examination before the Magistrate: the boy was asked what he was going to do with the ducks, and he was about saying something, when his mother checked him, and whispered—" say you were going to fight them ;" the boy then said so ; the Magistrate threatened to commit the mother.

" Cross-examined : The Magistrate said he wished he could commit both the father and mother ; witness's father behaved very well to the Caddys, according as they behaved to him.

" Mr. Ward was also present at the examination, and gave similar evidence.

" The Rev. Mr. Broughton remembers the boy being brought before him ; Mr. Barlow said the boy and girl had been stealing his ducks, and he therefore desired the girl might be brought before him also ; Mr. Barlow applied for a warrant, but the mother said she would bring her without ; the next day they appeared before him ; the boy was about to tell what he was going to do with the ducks, but was stopped by his mother, who said " say you were going to fight them ;" witness threatened to commit her, and told her she had first taught her child to steal, and was now teaching him to lie ; he did not know the girl was so young when he desired her to be brought before him.

" Cross-examined : Mr. Barlow brought his charge against both, and persisted in it ; he had no scruple in committing them, and should do so again notwithstanding what the King's Bench said about their tender age ; he never had any of the plaintiff's family brought before him previously ; he generally takes the evidence in the presence of the accused, but in this instance the children were left in the passage ; he does not like to have dirty people come into his room.

" Mr. CAMPBELL replied, and animadverted strongly on the conduct of the Magistrate.

" Mr. Baron VAUGHAN said that great allowances were to be made for Magistrates, as they performed their very arduous and important duties without any fee or reward. He had no doubt Mr. Broughton acted under the impression produced by Mr. Barlow's statement. The Learned Judge then proceeded to point out the various prominent parts of the evidence, and expressed an opinion favourable to the plaintiff.

" The Jury, after ten minutes' consultation, found for the plaintiff—Damages, One Hundred Pounds."

This is a highly satisfactory verdict, with the exception, however, that it does not affect the right person: results, nevertheless, may arise from the trial which will be even more beneficial to public justice, than the hundred pounds to the poor cottager.

The effect produced by the severe censure of the Court of King's Bench, in the quarter to which it was directed, could scarcely have been anticipated by that august body. The Court said, that " certainly, considering the age and the circumstances under which these children were brought before the Magistrate, a discreet and

commonly humane man might reasonably be induced to pause before he committed such tender infants to a common goal." The Rev. Magistrate replies, that "he had no scruple in committing them, and should do so again, *notwithstanding what the King's Bench said about their tender age.*" The Court said, "there was another part of the conduct of this gentleman which it could not too strongly reprobate; namely, that of having taken the deposition of Barlow, the prosecutor, in privacy, behind the back of the persons accused. *For this conduct there could be no excuse.*" The Magistrate replies, that "he *generally* takes the evidence in the presence of the accused; but in this instance the children were left in the passage: *he does not like to have dirty people come into his room;*"—for what is justice to a Brussels' carpet?

After this display, it is edifying to find the learned Baron summing up with the customary homily, "that great allowances were to be made for Magistrates, as they performed their very arduous and important duties without any fee or reward;" the English of which is, that injustice is to be hugged, because it is gratuitous.

NOTE.

It is with much gratification that we announce to our readers the speedy publication of a work upon Judicial Evidence and Procedure, compiled from the manuscripts of Mr. Bentham. The work is entitled *Rationale of Judicial Evidence specially applied to English Practice*: but the title does no justice to its contents. It embraces the whole field of Judicial Procedure. All the great questions connected with jurisprudence are either directly or indirectly discussed. The author's speculations upon the interesting subject of Evidence are already partially known to the public from the *Traité des Preuves Judiciaires*, published by M. Dumont, of Geneva; but the strictures on English Law and Practice, which form more than half of the present work, were purposely omitted by Mr. Bentham's foreign editor. The present publication, under the head of Causes of the Exclusion of Evidence, contains a treatise on the principal defects of the English system of Technical Procedure, which is not contained in the *Traité des Preuves*, but which, for the depth of its reasoning and the liveliness and poignancy with which it exposes established absurdities, stands unrivalled even among the works of Mr. Bentham. It was our intention to have given an outline of the work in our present number, but it would neither be doing justice to the importance of the subject, nor to the expanded and philosophic views of the author, to attempt to do so upon a hasty perusal. We must therefore, however reluctantly, postpone our observations to the next number of the JURIST.

THE JURIST.

JANUARY, 1828.

ART. I.—EARLY PROCEEDINGS IN CHANCERY.

A Calendar of the Proceedings in Chancery in the Reign of Queen Elizabeth ; to which are prefixed Examples of earlier Proceedings in that Court, viz. from the Reign of Richard II. to that of Queen Elizabeth inclusive.—From the Originals in the Tower, Vol. I. 1827.

THIS is in every respect one of the most valuable books that have yet been printed under the authority of the Commissioners of Public Records, and its importance cannot be better appreciated than by an analysis of its contents, with the help of the key furnished by Mr. Bayley (the Sub-commissioner under whose directions the volume has been compiled), in his short but sensible preface.

“In carrying into effect,” he says, “the order of His Majesty’s Commissioners, it has been deemed advisable to preface this work with some examples of the bills or petitions addressed to the Chancellors in each reign, from the earliest period that any of them are known to be extant, as they throw considerable light on the origin of the Court of Chancery, as a court of equitable jurisdiction ; and as they point out the variations that have taken place from time to time in the course of proceedings in that court, and shew under whose authority or administration those alterations have been introduced ; they afford also considerable insight into the manners and customs of the times, and the orthography and phraseology of the English language, when it first came into frequent use in Chancery and diplomatic proceedings.

“Lord Chancellor Ellesmere, in his observations concerning the office of Chancellor, states that there were no petitions of the Chancery remaining in the office of Record of older time than the making of the statute of 15 Hen. 6, which enacted that no writ of subpoena be granted till security should be found to satisfy the defendant for his damages and expences, if the matter contained in the bill could not be made good ; and he adds that the most ancient to be found were of the 20th year of that king. It has

appeared, however, from discoveries which have been made among the records in the Tower since the year 1811, that many hundreds of suits, for nearly fifty years antecedent to the period mentioned by Lord Ellesmere, are still extant. They commence in 17 Rich. 2. in which year a statute was made, enacting that when the suggestions of the plaintiff were proved to be untrue, the Chancellor should be entitled to award costs and damages to the defendant according to his discretion; and it is probable that the bills or petitions of this year were the first that were regularly filed.

"From these proceedings it appears that the chief business of the Court of Chancery in those early times did not arise from the introduction of uses of land, according to the opinion of most writers on the subject; very few instances of applications to the Chancellor on such grounds occurring among the proceedings of the Chancery, during the four or five first reigns after the equitable jurisdiction of the court seems to have been fully established. Most of these ancient petitions appear to have been presented in consequence of assaults and trespasses, and a variety of outrages which were cognizable at common law, but for which the party complaining was unable to obtain redress, in consequence of the maintenance or protection afforded to his adversary by some powerful baron, or by the sheriff or other officer of the county in which they occurred.

"The petitions in the reign of King Richard the Second are very numerous; they are all in the French language, and from some of the few examples which are here introduced, it will be seen that, even at that early period, the practice prevailed for the plaintiff to find sureties to satisfy the defendant for his costs and damages, in case he failed to prove the matter contained in his bill.

"During the active reign of King Henry the Fourth, no bills or petitions addressed to the Chancellor have yet been found, and comparatively few appear to have been filed during that of his son and successor King Henry the Fifth.

"From the commencement of the reign of King Henry the Sixth, the bills or petitions and other proceedings in the Court of Chancery, appear to have been preserved with greater regularity; and in his time the use of the English language, which had been partially introduced in the time of his predecessor, became generally adopted.

"For many years the usage of the court appears to have been for the defendant to be brought before the Chancellor and examined *viva voce*; but from the time of King Henry the Sixth, a course more assimilating to the present practice seems to have been pursued; and, in most cases, which were not of a mere personal nature, the answers and other proceedings are preserved in writing, as of record.

"But few decrees in these early periods have been discovered, and these are generally found endorsed on the bill, a practice which continued from the time of Henry the Sixth down to that of King Henry the Eighth, if not to a later period."

Our legal readers will not be displeased to see the earliest extant specimen of a Bill in Chancery, with which we shall accordingly present them, both in the original French, and in the subjoined translation. It is without date, but Thomas of Arundel, Archbishop of York, to whom it is addressed, filled the office of Chancellor from 1392 to the 23d of November, 1396; and, as Thomas, Earl of Stafford, who is mentioned as then deceased, died on the 4th of July, 1395, (on whose death custody of his

castles and lands was committed to Thomas, Duke of Gloucester, the present plaintiff,) it is not far from being ascertained.

"A tres reverent pier en Dieu lercevesque Deverwyk, chaunceller d'Engleterre monstre Thomas Duc de Glocestr' que comme per enquest pris devant l'eschetour nre Sr. le Roy en le countee de Salop per brief de diem clausit extremum apres le mort Thomas nedgers Count de Stafford, trouve soit per meme l'enqueste que le dit nedgairs Count morast seise en son demesne come de fee entre autres terres et tenz en mesme le countee d'une mees et certains autres tres ove les apptenances en la ville de Bruggenorth en le dit countee, la garde de quelles tres et tenz entre autres tres et tenz queux furent a dit nadgairs Count feut comys a le dit Duc, a avoir sur certain forme come en les lettres patentes nre dit Sr. le Roy ent faites a dit Duc plus plenment est contenuz : et ensi soit que Thomas Othale ovesque plusieurs autres gentz soit entrez en les ditz mees tres et tenz en la dite ville sur la possession nre dit Sr. le Roi: dont please a vre sage discrecion considerer la matire susdite et grantier brief directez a dit Thomas Othale pur estre devant vous en la Chauncellerie nre dit Sr. le Roi a les octaves de la Trinite p'chlen avenir sous peine de C li. per respoudre des choses susdites faites en contempt nre dit Sr. le Roi."

"Indorsed—Crastino Johes Bapte."

Translation.

"To the very reverend Father in God the Archbishop of York, Chancellor of England, sheweth Thomas, Duke of Gloucester; That, whereas by an inquest taken before the Escheator of our Lord the King in the county of Salop, by writ of *diem clausit extremum*, after the death of Thomas, late Earl of Stafford, it was found by the same inquest that the said late earl died seised in his demesne as of fee, among other lands and tenements in the said county, of a messuage and certain other lands and tenements, with the appurtenances, in the town of Bridgenorth in the said county, the custody of which lands and tenements, among other lands and tenements, which were of the said late earl, was committed to the said duke, to have under a certain form, as in the letters patent of our said Lord the King thereupon made to the said duke is more fully contained. And so it is that Thomas Othale, with divers other persons, hath entered into the said lands and tenements in the said town, on the possession of our said Lord the King. Wherefore may it please your sage discretion to consider the matter aforesaid, and to grant a writ directed to the said Thomas Othale, for to be before you in the Chancery of our said Lord the King at the octaves of the Trinity next coming, under the penalty of £100, to answer the matters aforesaid done in contempt of our said Lord the King."

In this very venerable record two things are principally observable; one, that it contains no allegation of the matters complained of being "remediless at the common law;" the other, that no relief is prayed, but merely that a writ may issue requiring the defendant to appear and answer—that writ, however, being no other than the famous "*subpoena*," the first invention of which, by John de Waltham, bears date about twenty years before this period, and which, at its creation, assumed the precise form, from

which it has never substantially varied, although the late Chancery Commissioners, not having the fear of Grimgribber before their eyes, have had the unparalleled rashness to recommend an alteration, by which it may be made more clearly to express what are the consequences expected, according to modern usage, to be attached to it.

It is worthy of remark also, that the extraordinary interference of the "Chancery" in matters of this description was, even at this early period, the subject of frequent remonstrance; and the 17th of Richard 2. (the year in which this Bill was probably exhibited), is the æra of a very strong petition by the Commons, the answer to which was embodied in a statute referred to by the preface already cited. The prayer of the petition went further, by requiring that the plaintiffs in such "writs of subpoena" might be required to find pledges to make amends to the defendant in case their suggestions had been untrue—a provision which, though then rejected, was afterwards carried into effect by another statute, (that of 15 H 6.) also above referred to. But, for the detail of these proceedings, amidst a mass of other curious matters connected with the same subject, the reader may consult a recent article in the *Quarterly Review*, (vol. xxxii. p. 92,) on the "Origin of Equitable Jurisdiction," the author of which is probably the only writer of the present age capable of satisfactorily illustrating a point so obscure and intricate, and at the same time of so great historical importance; one, who, according to the testimony of a very sufficient judge, "has already given evidence to the world of his singular competence for such an undertaking, and who unites with all the learning and diligence of a Spelman, Prynne, and Madox, an acuteness and vivacity of intellect which none of them possessed."—(*Hallam's Constitutional History of England*, vol. i. p. 56, note.)

The case made by the Second Bill in this collection is, that the plaintiff, one Geoffrey Downham, being rightful vicar of the Church of Abergelaw in North Wales, by collation of the Bishop of St. Asaph, ratified by the King's letters patent, the defendant (Heylyn ap Blethin) "by active suggestion, contrary to the statute," procured a Papal Bull to the vicarage, and afterwards, "per cause qu'il ne pouvoit exploiter per cet title," purchased letters of presentation from the King to the same, by colour of which presentment he was instituted and inducted, and had tortiously ousted the plaintiff, "en destruction de son povre estat et vivre." Whereupon the plaintiff obtained a writ of *scire facias* to repeal the said presentation. "Et ensy il ad poursuy per meme la cause de terme en terme a Nottyngham, Everwicz, Wyncestre, et Londres, sans exploier aver." And therefore prays that the

Chancellor will suffer his counsel to plead the said matter before him "in the Chancery," and moreover to do right to the said suppliant as law and reason demand, "per Dieu et en oeuvre de charite."

We shall offer no observation on the merits of this case, further than that it would be difficult to class it under any of the heads of modern equitable jurisdiction. The plaintiff seems to have been afflicted with a disease not peculiar to the age in which he lived,—delay of justice,—and he very simply comes into the Court of Chancery for a remedy, a course of proceeding which the experience of later ages has justly exploded. In this instance, however, we may remark that a prayer for relief is to be found, without any for the writ of subpoena.

This is followed by a Bill, setting forth the complaint of one John Tregoyts, that "whereas the said suppliant and his ancestors, from time whereof memory runneth not, have been freemen and of free condition, residing in the county of Cornwall," nevertheless, Thomas Beauchamp, Earl of Warwick, upon a false surmise, that the plaintiff was his "nief appurtenant to his manor of Carnanton," imprisoned and had detained him; since which he was discharged on mainprize to try the question of his free estate. And it prays the Chancellor "to order some remedy (tiel remedie) to the said suppliant in discharge of his mainprize and in salvation of his estate."

This, however remotely it may appear to bear upon our modern notions of the principles of equitable interference, is a curious document as illustrative of the domestic history of the age, especially when compared with a petition still extant among the Rolls of Parliament of the same year, (17 Rich. 2.) in which the Earl of Warwick himself appears as the aggrieved party, complaining that David Tregoyts (the father of the before-named plaintiff), being his villein, had sued out a writ *de homine replegiando*, to which the Earl had pleaded, and the question of villeinage being about to be tried upon the matter of the said plea before the Justices of the King's Bench, the trial had been prevented by the act of the plaintiff, who, with divers others assembling in warlike array, had seized upon the jury impanelled, as they were on their road through the county of Devon, and forced them to return into Cornwall; after which David, the father, procured the matter to be heard at *Nisi Prius* before the Justices of Assize at Saltash in Cornwall, to which place the poor Earl was made "*a son grand disease*" to travel, and to no purpose, as the refractory villein contrived by some other means still to delay the trial of the cause; which, coming on again to be heard before the Court of King's Bench at Westminster, was again managed to be postponed, and the Earl threatened with a second *Nisi Prius* adjournment; to avoid

which, he presents this petition, alleging that by virtue of the statute made by the "noble *tres-aiel*" of the King then reigning, (a) it is provided that inquests "que busoignent grant examinant" shall be had before the Justices of the Bench where the plea is pending, and therefore praying that the Justices of the King's Bench might take the present inquest without any *Nisi prius*, having regard to the great maladies with which the petitioner was afflicted, and the great inconvenience (*disease*) which it would occasion him to bear, to travel into parts so far distant. The prayer of which petition was granted accordingly.—(See *Rot. Parl.* tom iii. p. 326.)

The next is a clear case for an Injunction, although the Bill prays only general relief. It states that the plaintiff (a very famous merchant of Dartmouth, by name John Hawley) having purchased certain manors and lands in Cornwall, late the property of Sir Robert Tresilian, and which were forfeited to the Crown on his attainder, with a clause of indemnity in case of eviction, John Tresilian, son of Sir Robert, had, by maintenance of the Sheriff, set up a claim under an annuity deed, by colour of which the said Sheriff had distrained; *charging circumstances from which fraud is inferred*, and praying "such remedy as to his Lordship should seem reasonable, for the love of God, and for the indemnity of our said Lord the King, and in salvation of the estate of the suppliant."

The next is a case of Assault and False Imprisonment—the prayer of the Bill being that his Lordship will be pleased "to examine the defendant on this matter, and to investigate (conustre) his cause, and, moreover, to apply remedy and right to the suppliant, for the love of God and in work of charity." Immediately after which we have a female plaintiff, Joan Scaldewell by name, complaining of a violent outrage and robbery committed on the person of her husband by the defendant and others, for which they have been indicted, praying a writ to remove the indictments into the King's Bench, "and also a writ to cause the said Richard to come before you to give surety of the peace to the said suppliant and her husband, and to all their servants, for the love of God and in work of charity." What is most observable in this latter case, is the circumstance of the good dame suing alone without her husband, who has been "wounded almost to death, whereby he is in despair of his life," as also the indorsement on the writ itself, which is annexed to the Bill, and is as follows:—

"Ricardus Dei gra Rex Angl' et Franc', &c. Rico' Stormesworth saltem

(a) The statute referred to is Westminster the 2nd. c. 30. s. 1. passed 13 Edw. 1.

Quibusdam certis de causis, coram nobis et concilio nostro propositis, tibi præcipimus firmiter injungentes quod quacunque excusacione cessante et omnibus aliis prætermisissis in propria persona tua sis coram nobis et dicto consilio nostro in Cancellaria nostra die Martis prox', post festum Sti. Martini Episcopi prox' futur'; ubicunque tunc fuit ad respondend' super hiis que tibi ex parte nostra objicientur tunc ibidem, et ad faciend' ulterius et recipiend' quod curia nra consideraverit in hac parte. Et hoc sub periculo quod incumbit nullatenus omittas, et habeas ibi hoc breve. Teste Edmundo, duce Ebor' custode Angl'. Apud Westm', 10 die Nov. A°. r. n. 18.

Indorsed.—Johanne ux' Johis, Saltewe (Scaldewell?) sequitur hoc breve."

The two last cases, as well as the two which immediately follow, afford abundant evidence of the turbulent and distracted spirit of the times, and recal a state of society much more nearly resembling that which, to the disgrace of the British Empire and of the nineteenth century, still characterises the sister Kingdom, than many of our statesmen would like to acknowledge. We shall merely, however, give the heads of the two following—the one between two worshipful knights, Sir Thomas de Erdington and Sir Hugh de Shirley; the first complaining of the second, for that, having presented against him a writ of *assize of novel disseisin*, and also delivered him a writ of *estrepement*, he (the defendant) nevertheless assaulted plaintiff's servants, and committed waste on the lands in dispute,—the other, a Bill by one Thomas Goddred (a tenant of Henry, Earl of Derby, afterwards King Henry the Fourth) against one Henry Ingpenne, complaining of an outrage still more barbarous and malicious than either of the preceding, but for which it would sorely perplex the most able of our equity draftsmen to discover how the Court of Chancery could afford any relief. But, however little instruction on the head of equity either of these cases may seem calculated to furnish, they are both worthy of remark; the first for its indorsement of the names of two sureties for the plaintiff, who undertake to make satisfaction to the defendant for the damages and expenses of the suit, "sub pœna in statuto indedito contenta," in case the plaintiff should fail to prove his case; the second for a letter, in which the Bill itself is enclosed, addressed by the same Earl of Derby to the Chancellor, which we will give entire, no less as a specimen of royal composition, than as an example of the sort of influence which was in those days resorted to for the purpose of obtaining justice against the most flagrant offenders:—

"Tres reverent piere en Dieu, et mon tres chier et tres entierement bien aime uncle. Je vous salue de tout mon cuer scavant come je scey ou puis puisse. Vous remerceant do tout mon cuer de touz les gentillesses et naturesses quelles envers moy et les miens je troeve toutdis en vous, et vous prie de votre bone contenance. Et tres reverent piere en Dieu et mon tres chier et tres entierement bien ame uncle plese vous assavoir que je vous envoie close deins cettes une bille adressez a vous, la quelle mestoit

baillie par mon bien ame tenant et fermour de mon manoir de Henton, Thomas Godard, a cause des diverses trespasses à lui faitz par un Henry Ingepenne; sicome par la dite bille il vous purra pleinement apparoir. Si vous prie tres reverent piere en Dieu et mon tres chier et tres entierement bien aime uncle, de tout mon cuer, que vous vouliez envoier pur le dit Henry par brief nre tres redoute Sr. le Roi pur respondre a mon dit tenant des trespasses ensi a lui faitz en cas que la loy le voet soeffrir et que ce purra estre fait sauvent vre honour et estat et sans despleser de vous sicome je maffie entierement de vous. Tres reverent piere en Dieu et mon tres chier et tres entierement bien ame uncle, je prie a nre Seigneur tout puissant que vous doigne attend de honour et joie come vre cuer le desire a tres long durer. Escrit à Hertford, le 10 jour de Novembre.

“ Henry de Lancaster C. de Derby.

“ *Indorsed*.—A tres reverent piere en Dieu ec. Lercevesque Deverwyk primat et Chancelier Dengleterre.”

We have next a case of a different description, and one which, with the aid of half-a-dozen counsel for either party, selected from both sides of Westminster Hall, and supported by affidavits *ad libitum*, might well occupy the Court of Chancery at the present day for the better part of a term, and leave the Chancellor at last sorely perplexed whether to grant an injunction or leave the plaintiffs to their common law remedy. The case is that of the burgesses and tenants of *East Retford*, against Thomas de Henry, Knight; and the Bill sets forth that, whereas the plaintiffs, their ancestors and predecessors of the same town, have since time of memory used to depasture their beasts in the fields of *West Retford*, paying to the Lords of that town at a certain rate for every beast so depastured; now the defendant, one of the Lords aforesaid, has levied of the said burgesses double the accustomed rate, “in defeasance of the right of the King, and to the great impoverishment of them the said burgesses; added to which, he hath moreover stopped an ancient water-course, sent his servants to fish, ‘with force and arms,’ in the common water of *East Retford* without a shadow of right, broken up their pavement, and assaulted and impounded a certain Hermit whom they employed as their paviour, together with his cart and horses, and committed divers other common law wrongs and injuries;” in respect of all which matters they pray, “in preservation of the King’s right, due and speedy remedy for all the wrongs and oppressions aforesaid, so that they may be able to pay to the King their farm of the said term, and to live in tranquillity and peace as the liege tenants of the King and faithful and loyal subjects.”

The nature of the two following cases may be collected from the respective summaries prefixed to them. That of *John Bief v. John Dyer*, is, that plaintiff being bound to Robert Goldsmith in an obligation for the sum of sixty shillings, defendant claimed payment from him by means of a forged power of attorney

and acquittance, whereby the plaintiff was obliged to pay the same sum over again to the obligee, and put to great costs, and, when he called on defendant at his house, he (defendant) locked him in, and attempted to murder him. Therefore praying a writ, directed to the Sheriff of Suffolk, "to cause to come and to have the said John Dyer before you, on a certain day, under a good penalty to answer the matter aforesaid, 'et de trouver bone seurte al dit suppliant.'"

Indorsed,—Pledges to prosecute, &c. &c.

The next (which is the last of the reign of Richard the Second), is between John de Sessay, citizen and merchant of York, and Peter Bevenek of Denmark; setting forth that defendant having taken a ship with its cargo at sea belonging to plaintiff, the said ship, together with its captor, had been driven into the port of Hull by stress of weather; praying therefore a commission to arrest the defendant, and to cause him to come before the King's council, to answer as to what shall be there objected to him; "and that the said ship remain under arrest, with the goods which are therein, until this matter be determined by the council aforesaid."—Indorsed in like manner with the names of pledges to prosecute.

There have not yet been found any bills addressed to the Chancellor during the reign of Henry the Fourth, and very few during that of his successor. Of these, the earliest is also distinguished as being the first in the English language, and likewise as relating to a matter of trust, of which a Court of Equity, even at this day, would be clearly cognizant. It is as follows:—

"To my worthy and gracious Lord Bishop of Wynchester, Chancellor of England.

"Beseeching mekely your pour bedeman William Dodde Charyotere wheche passed over the see in service with our liege lorde, and was oon of his charioterys in his viages; and of hyze treste ffeied in my laud Johan Brownyng and John of Chekewell with my wyfe, wheche Johan and John after azenste my wyll and wetyng put my land to ferme, and delyvered my mevable good the valewe of xx marke where hem leste: and thus they kepe my dede and the 'denture with my mevable good unto myne undoyng, lesse than I have your excylent and gracyous helpe and lordshipe; besechyng yow at reverence of that worthy prince ys sowle your Fader, whose bedeman I am ever, that ye wolle sende for John and John aforesayde, that the cause may be knowne why they will holde my good to myne undoyng: also wheche am undo for brusynge in servyce of our liege lorde, and in service of that worthy Princesse my lady of Clarence, and ever wolde yef my lemys myght serve worthy prince sone. At reverence of God, and of that perelless Princesse his moder, take this matter at hert of almes and charite."

The next Bill contains a more distinct allegation than any we have hitherto seen of the inability of the plaintiff to have redress at law; an inability arising, however, not from any defect of the law itself, but from the over-mastering riches and power of the

defendant, who had wrongfully ousted him of a tin work in the county of Cornwall, “a perpetuel amentisement et destruccon de le dit suppliant s’il ne soit pur vous tresgracious S^r. eidez et remedie en cest partie, pur ceo que le dit John Wyse est cy fort et habundant des rechesse et graund maintenour dez querels en cest pays et le dit suppliant si poevre et n’est my hardy ne rien adi de suer pur remedie avoir al comen ley.”

The next bill is of a sort which would now be clearly demurrable, being a mere case of ejectment, but was probably at that time held to be sufficiently supported by a similar allegation, viz. “That the plaintiffs (husband and wife) are so poor, and the husband so ill, that they cannot pursue the common law.”

This is followed by a case of wardship which deserves attention, as probably the oldest on record involving this most important branch of the Chancellor’s jurisdiction; and it is remarkable that it is not by virtue of his alleged authority, as *parens patriæ*, but simply in respect of the feudal right of the guardian to the marriage of his ward, that the Chancellor is appealed to for the exercise of his extraordinary jurisdiction. The bill states that certain tenements within the City of London were lately descended to one Thomas Cosyn, an infant, on the death of his father, a freeman of the City of London, which by reason of non-age had been seized by the Mayor according to the custom of the said city, who had committed the wardship to the complainant upon sufficient surety to answer for the issues and profits of the estate to the infant when of age, after reasonable allowance for the costs of his maintenance—that the infant, “being at the house and in the governance of the said suppliant, affianced himself to one Maude, his (the suppliant’s) daughter, in presence of many persons, to have her for his wife; and since, the said infant hath been led away by Joan, mother of the said infant, out of the governance of the said suppliant, and by one John Fox, at Greenwich, in the county of Kent, is kept and detained against his will, to the intent to marry the said infant to another woman, at the will of the said Joan and John Fox, for to have gain by the same marriage, so that the said infant cannot come or go at large to perform his first affiance, if it be not by your gracious aid in this behalf.” The prayer is as follows:—“Please your gracious Lordship to grant a writ, under a certain pain by you to be limited, to the said John Fox, to be before you the Monday next to come, bringing with him the said infant upon the same pain, to be examined before your gracious Lordship of the matter aforesaid, and to do and exercise that which according to your very sage discretion right and reason shall demand.” It remains to be added, in illustration of the wide extent of domestic misery attendant on this most odious incident to feudal tyranny, that the party seeking

thus to withdraw the infant from the natural protection of a mother, with the most evidently interested motives, is of no higher rank than a vintner.

This is followed by a petition to the King by the parson of Street, in Somersetshire, complaining of sundry acts of oppression committed by the Abbot and Convent of Glastonbury, against the petitioner, for having ventured to sue them in the Spiritual Court for tithes. It is in the English language, and prays, "That it like to zoure gracieuse astate considere the grete power and richesse of the forsaid abbot and convent, and the mene power of the said parson; and comand to write to zoure Chanceler of Yngelond, to do clepe the parties for him and examine hem, and make an ende by twene hem of all that hangyth bitwene hem in zoure courtys, and so that the forsaid parson have tizth, for the mercy of Christ." To which we have added the king's letter missive inclosing the said petition.

"To ye worshipful Fader in God oure right trusty and wel beloved the Bisshop of Duresme, Chanceler of England. By the King.

"Worshipful Fader in God, right trusty and welbeloved, we grete yow wel, and we sende yow closed withynne theese our lres a supplication of grevous complaynt put unto us by Sir Rogier Wodehill, person of Strete, as ye may see more clerely by the same supplicacion, wherefor we wol, that the forsaid supplicacion wel understanden and considered by yow, ye doo calle before yow bothe parties specified in the same supplicacion, and there causes herd, that ye doo unto hem both right and equite, and in especial that ye see that the porer partye suffer no wrong, but that ye make such an ende in this matiere, that we be no more vexed hereafter with thaire complaints. And God have yow in his keepynge. Geven under our signe at oure town of Vernon, the 28th day of Avrill." (1419.)

The next is also a petition to the King from the tenant of his manor of Remson Hall, in Essex, who having for sixteen years been possessed of a tenement as heir at law to his father, was ousted by one John Wethy and others, by maintenance of John Tyrell; whereupon he sought protection of the Countess of Hereford, who put him again in possession, after whose death Tyrell again ousted him; and it prays as follows:—"Of the whyche wrongs my ful gracyouse lord the Kyng I besech zow of zour special grace that I may and that I may have in pees my ryghtful herytage, as I schal be yore trewe bedeman all the dayes of my lyve. And therto I besече zow of grace and sokore for his love that deyde on the Rode-tree a Good Fryday." This petition, which by a letter missive, dated at Montereau faut Yonne, 4 July, 1420, was in like manner referred to the Chancellor, relates several curious particulars, but is in so mutilated a state that it required some ingenuity on the part of the editor to furnish the summary of its contents which we have already given.

This is the last in the series of proceedings (if they may be so

called) in Chancery, during the first period of its recorded jurisdiction, viz. from the 17th Richard the Second to the commencement of the reign of Henry the Sixth; after which, as has been mentioned in the preface, a much more regular and systematic course of proceeding becomes gradually more and more discernible; but in tracing the history of the infant jurisdiction through that reign and those immediately following, we must content ourselves with stating the principal subject matters, adverting only to such as seem deserving of particular notice when they occur.

Edward Lord Hastings complains of Thomas Dacy, Esq., that he has wrongfully entered on a certain messuage and lands, the property of the suppliant, and prays that, in consideration of his (the said suppliant's) imprisonment, by reason of which he is unable to defend his right, the Chancellor will be pleased to grant his writ of subpoena to appear, &c. "so that both parties may shew their evidences and be justified as right lawe and reason will, or else as it be pleasing unto your Lordship."

John Staverne by his Bill sets forth that, whereas in a certain suit between the complainant and one John Bonington, the Chancellor had thought fit to order an adjournment until one David Marrys should have given evidence as to the matters in issue, now the said David Marrys is desirous of testifying accordingly, "but he would have a mandement fro yow for the cause that he should not be heldyn parcial in the same matier;" and prays a subpoena directed to the said David to appear, &c. "for to declare the treweth in the matiers aforesaid."

John Kymburley sues John Goldsmith for refusing to deliver a ton of wood which he had sold plaintiff, and for which he (defendant) had been paid in wool, and prays subpoena.

John of Cottyngham, having assaulted and attempted to murder William Midylton in a church, and still lying in wait for him, so that he dares not abide in the county, he (Midylton) in like manner prays a subpoena. The ground of offence is stated to have been the following words spoken by the plaintiff in the same church, "that it were better bell unronge at the sainting (qu?) tyme than the messe unsonge."

Nicholas Parker files his Bill against Simpkyne Ive, who is charged with having deprived one John Hemington of five marks of annual rent by means of a forged charter. It does not appear on the face of the bill what interest the plaintiff had in the property.

William Hubberd seeks to recover against John Beasyer, and others, his right under the will of John Hubberd, for the due performance of which the testator had incoffed the defendants.

John Westowe prays a habeas corpus *cum causis* for relief of the plaintiff, unjustly sued in the Sheriff's Court by defendant,

who had endeavoured to inveigle him (the plaintiff) into an intrigue with his wife, for the purpose of extorting money from him.

Joan, Queen of England, (dowager of King Henry the Fourth) complains of Robert Byshop, and others, in a case of assault and trespass, for invading the franchises of her manor of Gillingham, (which she held as dower) and carrying off one Nichol Neuport, "nief of the Abbess of Wilton," against the peace, and in contempt of our Lord the King, to the damage of the said Queen of 100*l*.

Another royal personage, Katherine, also queen-dowager, files a bill respecting the possession of certain goods to which the royal plaintiff claims to be entitled as forfeited by attainder of felony of the former owner, but which the defendant will "in no wyse" deliver "by cause of grate mayntenance y^t he hath, in so myche y^t he and other of hys craft have made a comyn purce to wythstond us, and all other to have oure ryght. Wherefore we suyd a writ *sub pena* direct to the sayd John, to apere afor you in the Kynges Chauncery, to be examynd of the sayd mater, the whiche writ was delyvered to the forsaid John in the Monday next eftyr the fest of Epiphany last passed, by John Byngham, in the presens of the Maire of Leycestre, and of many other worthy men of the same towne, and the sayd John Glover cast downe the said writ dispitefully in the strete, saying openly he would not receyve nor obey hit for no men that was thereabout; so let hit lye in the way in contempt of the Kynge. Wherefore lik it yowe to examyn the sayd John Glover of these maters aforesayd, and to punysh him and ordayne dewe remyde after youre wyse discrecion."

Henry Hoigges, of Bodmyn, in the county of Cornewayll, Gent. prays the Chancellor to restrain the defendant by oath from using "the craftys of enchantement wycheecraft and sorcerye" whereby "he brake his legge and fowl was hurt;" and moreover "in opeyn place saide that he wd wyshe him his necke to breake and hym endless to destroye without your gracyous lordship eide and support." The prayer is, as usual, for a *subpœna* to appear to be examined, &c. "And moreover hym to swere to forsake his every wycheecraft and sorcerye, and also hym to redresse and reforme to a good lyfe; and moreover hym to punyshe in amendement and correccion of hys soule, yn example to all others of hys secte." This worthy Cornishman, it seems, was an attorney, whose offence against the professor of the black art consisted of his having been employed professionally in a suit against the prior of Bodmin, to whom the defendant stood in the relation of priest and servant. Whatever other encroachments the Court of Chancery may since have made in respect of jurisdiction, it is evident that it has lost that which it is here called upon to exercise. The two following cases relate in like manner

to matters of spiritual cognisance—the first a case of sacrilege, the other of a more singular description, and of considerable historical interest; being that of a Bill filed against certain of Wycliff's followers, on account of various outrages alleged to have been committed by them against the plaintiff (a clergyman), by reason of his opposition to their heretical doctrines. Two schedules are annexed to this curious document—the first containing a list of the heresies imputed to the defendants; the second, a catalogue of the various grievances which are complained of as having been inflicted on the person and against the reputation and character of the suppliant.

However anomalous the nature of these proceedings, we have a clear case for equitable interference in that of *Stonehouse v. Stanshear*, which is a Bill to set aside a bond and conveyance of lands sold by plaintiff to the defendant, who had made him intoxicated, and otherwise taken advantage of his weakness of intellect, when absent from his wife and friends. This document is in a very mutilated state, and too long for an extract; but the story is admirably told, in a style of dramatic effect which, if retained in our present system of Chancery pleading, would render the Court as attractive as any of our summer theatres. The prayer is as follows:—

“Like hit to your noble Lordship to consyder the gyle disceyte covyn ymaginacion, and the matures above declared; And that I might havyn hadde and yet may have an hundred pounds for the reversion of the land of Stonhouse and King Stanley, (that I) am of grete age, that my discrecion many tymes and for the most part ys passed away fro me, and that bargayn that I was made graunte to Robt. Stanshear was when I was oute of mysylff, and also withoute my wyffe, frends, or eny, &c. money ayen which is redy and always hath be. And the seyde Robert Stanshear to delyver me agen all my charters and evidence, which he and his toke of myn; and to anulle as well the seide knowliche (acknowledgement) before the Chiff Baron, &c. to have and receive all my londes and rentes above seyde, as fully and as holy as I hadde hem before the seyde bargeyn made; and that y may make attorneys to serve in my name,” &c.

We are presented, soon after, with another case so strongly resembling, in its leading features, those which we have been taught to consider as of almost daily occurrence on the other side the channel, that, if the name of Connemara be substituted for Dartford in Kent, and the language a little modernised, we might even persuade ourselves that we are only reading an extract from some Irish journal of the present time.

Thomas Appellton complains, that whereas William Aleyn, Clerk of the Countinghouse within the King's Household, together with Robert Aleyn, his father, and one Thomas Cotes, “imagining of great malice beforethought extortiously to oppress and

finally to destroy the said suppliant against conscience and law, on St. Stephen's day, at night, between eleven and twelve of the clock, the 7th year of the King, with force and arms, on horseback in manner of war, riot, and rout, arrayed with bows and arrows, swords and bucklers, in manner of rebellion and insurrection, against the dignity of our Sovereign Lord the King and his Crown, came to the suppliant's house at Dartford, and took away Anne the daughter and one of the heirs of the said suppliant, *being within the age of twelve years and in his ward; whose marriage of right to him pertained, and to none other;* and that same daughter the said William Aleyn ravished by force villainously, and her enforced by the supportation and help of the said confederates, and wedded her against the will of her said father and all her friends, expressly against law, and against the form of all manner of statutes in such case made before this time." The Bill then sets forth how he, the said suppliant, might have had two hundred marks for her marriage, "and she to have been married to such divers notable persons as might expend 100*l.* of inheritance by the year of yearly livelihood, whereas the said William Aleyn at that time had not nor yet hath no foot of land of his own in England."—How afterwards the said William Aleyn "took an action of waste in the Common Pleas unjustly without conscience against the said suppliant, and with great maintenance, by colour of his said office, *broggid, hyred, and embrasid* to him the jurors, the which jurors were kept four days in London at the cost of the said William Aleyn, threatening and menacing the suppliant oppressively, so that the said jurors were ready to have condemned him in 1000*l.*"—How the confederates after this compelled him to make a feoffment of all his lands and tenements, to the value of eighty marks by the year, "to certain persons at the denomination of the said William Aleyn," paying him thereout a certain annuity, or rent, of 24*l.*, which he had nevertheless neglected to do; and had moreover cut down timber to the value of 100*l.* and more on the premises, and suffered the buildings to go into decay. And therefore prays the usual writs to appear and answer in the Chancery, "And that the said trespassers be punished for the said riots, oppressions, and offences after their desert. And if the said William Aleyn appear to the writ, that then he, by your direction, restore the suppliant to the said lands, if it be found by one examination that the said rent of 24*l.* was behind and unpaid to the said suppliant. And in case the said William Aleyn appear not to the said writ, that then it like you to ordain that your said suppliant be restored to the said lands in form aforesaid, with all manner of damages that he hath had in this party. Considering of your righteousness that your said suppliant hath no more livelihood to live upon, nor dare neither

go late nor *rathe* (early) into Essex nor Middlesex where the said lands lie, for to distrain nor for to make entry in the same, nor dare not, nor is not of power, in no manner of wise to pursue by law against the said William Aleyn for his damages; *nor can have none officer to execute no writ* against the said William Aleyn, whiles he standeth in his office aforesaid."

We have next a Norwich chandler complaining that, "whereas he truly used to buy and sell such merchandises as longeth to his craft, by the weights, according to the standard of the King's Exchequer; and also at the excitation of the poor people had made candles with wicks of flax, to serve them as well and as long to endure as candles made with wicks of cotton; selling thereof continually to them that verily know the said wicks made of flax a pound, less by a farthing than of candles made with wicks of cotton." Notwithstanding which patriotic dealings of this worthy chandler, the defendants, late sheriffs of the same city, "forasmuch as cotton was like to be of less price in the said city if candles were usually made there with wicks of flax," and forasmuch also as the suppliant had refused to sell his merchandise by certain weights ordained by the said sheriffs not according to the said standard, did, by colour of their office, break and enter the house of the suppliant, taking and carrying away therefrom two hundred and twenty pounds of candles, besides his brass weights before mentioned, and the body of the said suppliant moreover arrested and imprisoned, besides sundry other acts of oppression; in respect whereof they are required to answer in Chancery—"considering the poverty of the said suppliant, *and that he in this case hath no remedy at common law.*" Which last allegation we may perceive to have, by this time, grown into common use, though not yet so established as to be considered indispensable for the foundation of the Chancellor's jurisdiction.

Greatly to the discredit of the city of Norwich, the very next case to that of the chandler is one complaining of the *under-sheriff* of the same city, "the which is a great office, and draweth to it great rule in the said city," for the unneighbourly act of pulling down a house, which the plaintiff had just finished building, all but the thatching, merely for "evil will and despite," because this same house was a better one than his own next adjacent. It is difficult not to imagine that, in this case as well as in the former, notwithstanding the great seeming innocence of the complaining parties, there was more or less of the *suppressio veri*, if not of the *suggestio falsi*; or not to see in them sufficient reason for believing that, even at this early day, the extraordinary powers assumed by "the King's Chancery" had become a just ground of offence to the nation.

The lovers of family antiquity will be much edified by the case

which follows, where the Abbot and Convent of Burton-upon-Trent complain of Isabel Stanley, Prioress of St. Mary in Derby, for having wrongfully withheld payment of rent in respect of certain premises, the property of the plaintiffs. "And when any of your said bisechers, their servantes or mynysteres hath com in ther name to the said prioresse to ask the said rent, or seyde they would distreyne or sue agaynst her as the comon lawe wold, she hath answered with grete malice and seid: 'Wenes these churles to overlede me or sue the lawe ageyn me? they shall not be so hardy, but they shall aby upon their bodies and be nayled with arrowes; for I am a gentylwoman, comen of the gretest of Lancasshire & Chesshyre; and that shall they knowe right well.' A speech so characteristic of the proud house of Derby that we should do wrong not to recommend it, together with the rest of the reverend lady's conduct on this occasion, as detailed in the same document, to the especial notice of the Author of "Waverley."

The next case makes a nearer approach than any preceding one to the form and substance of modern pleading in equity. The complainant, William Lord Harrington, states that, he being in France, in the service of the late King Henry the Fifth, one Sir William Harrington, Knight, "late passed to God," was retained by him in his service, on condition of an annuity of twenty marks, for payment of which the complainant, at the request of the said knight, bound himself by deed, "the which deed, as it now appears, was but only *pro servicio suo impenso*." That Sir William remained in the service of the complainant for many years, receiving the annuity by regular payments until such time as he took part with one John Broughton against the complainant; "wherefore the said lord sent unto him, and saide that he shold either leave the said John Broughton, or else his saide annuitie and his services; and he sent him answer agayn that he wold not leave the said John Broughton, nor wold no longer do him service, nor have the said annuitie." That the knight lived five or six years after this event, during which time he neither received nor claimed payment of the annuity; but that now, after his death, the defendants, his executors, sued the plaintiff in the King's Court at Lancaster for the arrears—"the which suit is against all gude faith and conscience. Pleas it, your Lordship, these premises to concedir, and howe your siche besocher in this partie has no remedy by the comon lawe, to grant hym divers writtes of subpoena severally to be direct to the seid (defendants) to appear before the Kyng in his Chauncery, at a certayn day, and upon a certayn payn by you to be lemytt; there to be examynd of these premysses, and thicreupon ye to sett s che rewell as gude faith and conscyence in that partye requireth."

The next is a case of great suspicion. The warden and brethren of the Convent of Friars Minors in London represent that one John Oliver, late a friar professed of the same order, having twice left it, fell sick when on his way to Rome, and on his death-bed besought to be re-admitted, which could not immediately be complied with, by reason that the Queen was then in occupation of the convent; that he shortly after died, whereupon the defendant, pretending to be his executor, possessed himself of his body and goods, which the plaintiffs now seek to recover through the intervention of Chancery.

In the case which ensues we may remark some further progress. William Arundell, Esquire, by his Bill states that John, sometime Lord of Arundel, plaintiff's late father, enfeoffed Robert Lord Poynings and another in certain manors, to the use of his will; and, subsequently, by deed declared the same to be to the plaintiff and the heirs of his body. After whose death, the new Lord of Arundel (the plaintiff's brother) entered into possession, notwithstanding the feoffment, as heir, and enfeoffed the defendants to the use of *his* will, which, by a letter addressed to his mother (Eleanor Countess of Arundel) from Rouen, he declared to be "that a state should be made to the said beseecher, his brother, in all the said manors, &c. according to the will of his said father," which letter notwithstanding, the defendants refused compliance. The prayer is that it may like his lordship "to sende, by a serjeant at armes, for the defendants to appear before you in the King's Chancery, at a day by you to be limited, and then there to be examynd of all the matters forsayd, and thereupon to compelle them to make a sufficient and suer estat of all the said manors, &c. to the said beseecher, and to the heirs of his body comyng."

The next is by the Vicar of Wolforcheston (Wolverton) in Warwickshire, for withholding tithes due to the plaintiff, and taking his sheep, charging that the plaintiff can have no remedy by the law because the defendants are supported by the sheriff and others of their affinity, the principal defendant being, moreover, himself under-sheriff. To which Bill, we have the answer of the last-named defendant stating, that as to the matter of tithe, the same "is merely spiritual, and the knowledge thereof 'longyth to the ordinary, and not to the Kyng, wherefore he askes judgement if the Kyng's Courte of his Chancery in this case will have knowlege,"—setting forth, nevertheless, as a ground of defence that the tithes are of right payable to another. "And as to all the remanent of the matters contained in the said bill, that same is matter determinable at the comon law. Wherefore he understands not that the Kyng's Court of his Chancery in this case will have knowlege; nevertheless, for declaracion of the

matter to you, my Lord Chancellor, the same Edmund saith, that he never tooke ne drofe away any shepe of ye said vicery." A peculiar, and yet in principle a very unobjectionable mode of pleading, viz. by denying the facts to be true, and nevertheless submitting, by way of demurrer, that, even if true, the Court applied to had no jurisdiction.

Of the case of "*Katherine Bell v. Harry Rawe*," we can only afford space to state in the language of the prefixed summary, that it is a curious "Record of various proceedings in Chancery, before the Council, and in the Common Pleas, for the recovery of two houses in Rochester."

The Admiralty and Ecclesiastical Jurisdictions are infringed in the two next instances, no less than the common law by so many of the preceding ones. In the first, the plaintiffs, as attornies for certain merchants of Britanny, complain that a ship belonging to them, having the safe conduct of the Earl of Huntingdon, Lieutenant of Guyenne, was taken, with the money and goods on board, by three "ballingers," belonging to the defendants (two Cornish Knights, Sir Ramfray Arundel and Sir John Treryse), and pray restitution. In the second, Sir Walter Hungerford and Sir John Stourton, Knights, as guardians of the Prior of Ivechurch, complain of the Mayor of Wilton, and others, for compelling the prior of that convent to serve the office of bailiff and portreve of their borough, "whereas the lawe and the custome of the roialme of England is, that no man religious shall be chosen bailly, bedell ne none other officer temporell."

The next is a specimen of a Bill for discovery in aide of an action at law. One Roger Polgrenn complains of the defendant, his father's executor, for refusing to deliver up to him, as his heir, the principal goods of the deceased, according to the custom of the county of Cornwall; and the bill prays a subpoena to appear, &c. and be examined what goods of the plaintiff's said late father have come to the possession of the defendant, so that upon "soche examinacon dewely hadde your saide, besecher maye have yn knowelich off what godys he maye conceiv hys accon att the [common] lawe, consideryng that wythoute soche examinacon hadde your saide besecher ys wythoute remedy."

The next is a case of historical interest, as well as involving a clear point of equitable doctrine. We have here the famous Talbot (John, Earl of Shrewsbury) complaining that the defendant had purchased part of a cargo of salt, taken at sea, *with notice* that it belonged to the plaintiff; "the which salt was gyven to the said Erle by the Duke of Brytan, to have ben led unto Roone (Rouen) in holpinge of his raunson."—Talbot was made prisoner in the sixth year of Henry the Sixth, and exchanged four years afterwards, at a very considerable ransom, of which, it

appears by this bill, that part remained unpaid for several years after, since he sues as Earl of Shrewsbury, an honour which he did not attain until the 20th of the same King. The transaction to which the bill has reference is stated to have taken place, anno 17 Hen. VI.

This is followed by a case of assault and false imprisonment, of which no more need be said. After which we have a buxom widow, Margaret Appilgarth, of York, complaining that, "where Thomas Sergeantson, of the same, at dyvrse tymes spak to your said besecher ful sadly and hertily in her conceit, and sought upon her to have her to wyfe, desiring to have of her certaine golde to the some of 36*l*. for costes to be made of their marriage and to employ in merchandyse to hys increase and profit as her husbände;" wherewith she having fondly complied, he, a gay deceiver, had "taken to wyfe another woman, in grete deceit, hurt, and utter undoyng of her, without your gracieux help and socour." Therefore praying his "good Grace to consider the premisses, and that your said besechere no remedy hath by the comone lawe to get againe the said somme;" and therefore to graunt a writ, &c.

We pass over the two following as of little moment, and come to an examination before the Bishop of Bath and Wells, Chancellor, of two persons to whom one Robert Crody had made a feoffment by parol on his death-bed—a *donatio mortis causa*—"saying to them in this manner:—'Sires, ye be the men in whome I have grete truste afore moche other persones, and in especial that suche will as I shall declare you at this tyme, for my full and last will, shall, through your gude help, by oure Lordes mercy be performed; wherefore I lete you have full knowlich, that this house, the which I ly in, and all myn other landes and tenements in this toune, I geve and graunte to you, to holde to you, your heires, and assignes, to this entent, that after myn decease, ye shall make estate of the same house, landes, and tenements to Alice, my wyfe, for terme of her life, so that after her death they remayne to Margaret, my doghter, and to the heires of her body lawfully becomyng, and if sche die withoute heir of her body comyng, that then they remayne to my right heirs for evermore. And to thentent that this my last will mowe be performed by you, as my trust is that it shall be, here at this tyme I delyver you possession of this house, in the name of all my landes and tenements, afore especified, as holy and entirely as they were ever myn atte any tyme;' by force whereof the forsaide John and Thomas were possessed of the house, lands, and tenements aforesayde, in their desmesne as of fee," &c.

This simple mode of conveyance may be recommended to the consideration of Mr. Humphreys.

We have then a Bill by a citizen of London for the delivery up of a bond, alleged to have been obtained from the plaintiff by the defendant, common clerk of the said city, by process of imprisonment; to which it is answered that there is such an instrument remaining in the Guildhall among the records of the city, which defendant has no power to remove without an order of the Mayor and Aldermen; praying therefore to be discharged and bill dismissed, &c.

The next case furnishes the first instance of an application, of which we find frequent examples among the proceedings of the following reign, viz. for a writ of *habeas corpus cum causis*; the ground of which, in the present case is, that the plaintiff has been sued and arrested by the defendant, on account of a bond alleged to have been fraudulently obtained: and what is singular in the form of the proceeding is, that to the bill is annexed a schedule of the causes for which the writ is stated to be demandable.

The memorable historical event of Jack Cade's Rebellion forms a principal ingredient in more than one of the ensuing cases. The first of these is a Bill to set aside a release of lands made by process of imprisonment to the Lord Say, who afterwards "knowyng himself to be putte to deth by that horrible and crewell tratour Jakke Cade, openly knowleched among other extorcions this mater, requiryng and charging a chapelyn, called Sir Thomas Oldhell, then beyng his confessour, that he should do his faithfull labour to the wife of the said Lord Say, that your beseecher myght have restitution," &c.

This is, to be sure, a little inconsistent with the language which our great poet puts into the mouth of this unhappy nobleman—

"Have I affected wealth or honour? speak.

Are my chests fill'd up with extorted gold?

Whom have I injur'd, that ye seek my death?"

Henry VI, Part 2, Act 4, Sc. 7.

But, if the tale here told have more truth in it than is usually to be met with in a Chancery Bill, it affords an instance at least of exemplary penitence and desire of making amends *in articulo mortis*.

The other case referred to is of a similar cast. The plaintiff, Godfrey Hylton, Knight, states, that whereas of the confidence and trust he had to one John Heck, late his servant, since deceased, at the time of the insurrection of "the grate tratour, John Cade," he deposited with him certain jewels, upon which he advanced from time to time several sums of money for the use of the plaintiff, and afterward being on his death-bed, sent for the plaintiff, having made the defendants his executors, and there before the plaintiff and defendants, "confessed all the said jewels

by name that he had in keypyng of your sayd supplyant, requiring and charchying his sayd executors, that whensoever your sayd oratour would content them of the said xx marks, they should holy delyver him his said juelx;" yet now the said executors "utterly refuse against fayth and conscience" to deliver the same, shewing further "how that your said oratour is withoute remedye at the comyn lawe in this cas," and praying accordingly.

At this period, the jurisdiction in matters of trust seems to have been fully established, and the greater number of bills filed seem to have been in cases of that description, as may appear by the following summaries.

Roland Groos v. Thomas Depeham.

"Bill setting forth that plaintiff's father having enfeoffed defendant and another, in trust to refoff him or his heir; and plaintiff after his father's death having continued them his feoffees, and having commenced an action against one William Styward for trespasses on the lands, defendant released to said William Styward all actions, &c. whereby plaintiff's suit is abated."

Thomas Fitz Harry and Wife v. John Lyngen.

Bill complaining that plaintiff, the wife, and her son the defendant, having been left joint executors of her former husband, it was agreed between them that she should have a certain portion of the goods of the testator, and pay his debts; wherefore she took possession of them, and had paid a part of the debts, when defendant forcibly seized and carried away the remainder, and had also forcibly taken possession of two manors in which plaintiff had an estate for life. Therefore praying "that a privy seall upon payne of his allegeaunce may be directe to the said John, commaundyng him to appere before you, &c. to answere of his riotes misrule, ungoodely and unlawfull demenyng, and then there-upon to procede as lawe faith and conscience requiren."

The answer of the defendant to this bill is, that it was agreed between him and plaintiff, that she (plaintiff) should have the goods mentioned in the bill, on condition that before a certain day she should find surety to indemnify defendant, and there deliver up to him all evidences concerning his inheritance, which she had neglected to do; and that he therefore took the goods for the purpose of administration, but which the plaintiffs had since retaken and converted to their own use. As to the other matters contained in the bill, he answers, *seriatim*, "by protestacion, not knowyng no thyng conteyned in that article to be trewe, that the matier conteyned in that article is matier determynable at the comon lawe." The decree indorsed is, "Infrascr' Johes Lyngen dimissus est de cur' quietus sine die ex assensu partis quer'."

The case made by John Cobbethorn, and others, executors of Edmund Lacy, Bishop of Exeter, deceased, by their Bill against one Hugh Williams, a priest, is, that defendant having been bound to the late bishop in an obligation for 40*l.* afterwards by fraud and concealment obtained a general release from one of the executors, whose servant he became, which release he pleaded in bar of an action on the bond, praying subpoena, &c. To this bill the defendant puts in an answer denying the fraud and concealment; whereupon the plaintiffs reply, and a writ of *dedimus potestatem* is granted to certain commissioners to *examine the parties*, and such other witnesses as they may see fit, concerning the truth of the matter. The return to this writ, together with the several depositions, is also preserved, and the whole forms a very complete specimen of a Chancery suit in the fifteenth century except that we are left in ignorance of its termination.

Alice, widow of Lord Lovell, claims by her bill to be entitled to certain lands as last in remainder, under an entail created by fine, alleging that defendant pretends title to the same under a feoffment, which plaintiff charges to have been made in trust for the uses of the same fine. To this bill we have also an answer setting up a different title from that charged by the bill, and praying that he may be dismissed "with his resonable costs for his wrongfull vexation." This answer is very circumstantial, but the case seems to be not a little obscure.

William Babington v. William Gall, clerk.

The Bill states that plaintiff's mother, the widow of Sir William Babington, Knight, had placed six hundred marks in defendant's hands for the purpose of founding a certain charity, which he had neglected to do. The defendant by his answer admits the receipt of the money for the purpose in the bill stated, but adds that it was the will of the donor, in case the endowment of the charity was not completed within four years, not then expired, that the money should be applied to certain other charitable purposes, concluding thus:—"And the said William Gall sayeth that he is, hath been, and shall be redy at alle tymes to paye the said money according to the said wyll and entent of the said Dame Mayery, in syche maner and fourme as this court wole reule hym."

John Wackeryng v. Nicholas Bayle.

A Bill to compel the defendant, a feoffee to the use of the will of one Robert Scarborough, to make an estate of certain lands in Tottenham and Hornsey, to St. Bartholomew's Hospital, praying as follows:—

"Wherefore please hit youre gracious Lordshipp, consideryng the premises of the grett devout entent, will, and fundacion, for a perpetuel memoriall there of the said Robt. Scarborough, Richd. Sturgeon, and other; and how that

the said chapell was founded and halowed under the condition that it shuld be sufficientli endowed; and as the said Richd. promised and ensured the said Robt. that with the said landes the said chapell shuld be endowed; and how that the saide chapell was pryncipali of devocion made for a notable memoriall of all Cristen soules, because grett multitude of Cristen peple of all partes of England and other nacions, for sekenasse, poverté, and miserie, contynualy of custom resorten to the saide hospitall, and there be relieved, and finalli have then here Cristen sepulture rounde aboute the said chapell; to graunte unto your said besecher a wrytt sub pena directed unto the said Nicholas," &c.

We have now completed a minute, but we think not a tedious analysis of the contents of this curious volume to the end of the reign of Henry the Sixth, omitting only a few cases of mere assault and trespass, or of the like nature, (b) which every now and then, even to a much later period, occur to remind us how far our ancestors still were from the attainment of that which some of our jurists appear to consider as among the greatest of constitutional luxuries, a distinct equitable jurisdiction.

From Henry the Sixth to Elizabeth, with whose reign the *Calendar of Proceedings* regularly commences, we discover among the selected specimens a gradually increasing tendency towards a separate system. Considerably the larger number relates to matters of trust and confidence, the most extensive field of modern equitable jurisdiction, and perhaps the only one (with reference at least to first principles) on which it is or can be beneficially exercised. Many of these arise out of feoffments to uses, but not by any means in a sufficient proportion to justify the notion derived by Blackstone from Spelman, and too hastily adopted by an excellent living historian, that the Chancellor's peculiar restraining jurisdiction originated in the practice of such feoffments. (c)

It is, we think, established to demonstration that the general jurisdiction of the Court was derived "from that extensive judicial power which, in early times, the king's ordinary council had exercised;" but that it arose gradually and insensibly, as circumstances occurred, and occasions seemed to demand it; and that, having so arisen, it afterwards settled down, by equally slow degrees, and in consequence of the occasional resistance excited to its encroaching and despotic spirit, appears to us to be as clearly demonstrable. In short, nothing seems more clear than that the consummate

(b) E. g. A Bill, addressed to the Master of the Rolls, complaining that defendant had ravished his servant maid.

(c) See "Hallam's Constitutional History," Vol. i. p. 370, &c. The whole passage is deserving of great attention, and appears to illustrate

very sensibly the state of the questions between the Courts of Chancery and common law in the time of Bacon and Coke, but embodying some erroneous, or at least doubtful, notions as to the origin of the English system of equity.

wisdom and foresight which certain eulogists of the system have pretended, and, perhaps, believed themselves to discover in the institution of a distinct equitable jurisdiction, never existed but in the imagination of later ages; that the fabric itself was the work of time and chance, although fashioned by the skill of some able successive architects into a structure of apparent convenience and symmetry; but that, having subsequently been augmented to an extent wholly unproportioned to the views of the early builders, and requiring an expence equally disproportionate to keep it in repair, and provide for the still further extension which even its past unnatural increase seems to render every day necessary, it has at length become a measure of expedience to examine its foundations, and ascertain whether the reconstruction of some of its parts, and the total removal of others, would not be practicable, and if so, whether not far more serviceable than the continual waste and expenditure occasioned by new erections.

It is with a view to the gradual attainment of this very important object, that we have occupied so much time and space in the examination of what may otherwise appear to be matters rather of antiquarian curiosity than of political utility. But the subject does not admit of further extension at present; and, with reference to the remaining contents of this volume, we shall content ourselves with adverting to the principal heads of equitable jurisdiction which we find gradually developing themselves in the proceedings to the time of Elizabeth.

The first case of mortgage occurs in the fourth year of Edward the Fourth, and the Bill prays in effect, although not in terms, a redemption, but the decree indorsed is a dismissal for want of sufficient proof of the allegations made by the plaintiff. No other case of mortgage occurs within the period we mentioned, that is among the proceedings now published; but in the 40th and 41st of Elizabeth we find the record of a Bill, answer, and replication, in a cause of "John Shakespeare, of Stratford-upon-Avon and Mary his wife v. John Lambert," which have not escaped the industry of the poet's commentators, being also printed in the appendix to the second volume of Malone's last edition.

The earliest instance in which we find an injunction to stay proceedings at law specifically prayed, is that of Henry Astel v. John Causton, in 22 Edward 4.; but it does not appear upon the proceedings whether an injunction was actually applied for, and the decree is to discharge the plaintiff absolutely from the debt in respect of which he had been sued. Shortly afterwards in 1 Richard 3, we find an injunction actually decreed, in the following terms:—

"Mem. qd term. Paschæ, viz. etc. injunctum fuit infrascripts T. H.

per dñum Cancellarium Angl' et per auctoritatem Cur' Canc'; qd' ipse sub pena forisfacturæ mille libr' ad opus dñi Regis Edward' per se aut per alium seu per alios nullo modo ulterius persequatur in loquela quæ pendet coram justic' dñi Regis ad p̄cta coram ipso Rege tenend' etc. quousque materia hujus petitionis plenarie fuerit determinat' vel alias licentiat' fuerit per cur'."

Among the proceedings in the reign of Henry the Seventh, we find a Bill to perpetuate testimony which deserves more particular notice. In it the plaintiff John, Earl of Oxford, states that his mother, the late Countess of Oxford, deceased, having been imprisoned for her allegiance to King Henry the Sixth, and "compelled by coercion to depart with her livelihood to Richard, late calling himself King Richard the Third, then Duke of Gloucester," of which facts there were "divers worshipfull and credible persons privy and had perfect knowledge thereof, of them diverse be of great age, and if they should decease, their witness in that behalf not had nor entered of record, the knowledge of the said imprisonment and coercion might run out of mind, and thereof might ensue great vexation and trouble to the said Earl and his heirs of and for the inheritance of his said mother," he therefore prays writs of subpoena to be directed to the several persons therein named as *defendants*, "the which were privy and had perfect knowledge of the manner of the departing of the said Countess from the said livelihood, commanding them to appear before the King in his Chancerie at a certain day, there to depose and witness all that they knowe" touching the same, "and that their depositions and witness may be then entered and remayne of record and knowlege aforesaid." It is observable that the parties named as defendants in this record are mere witnesses; those, namely, whose evidence is sought to be perpetuated; and that those claiming, or who might claim, under the alleged grant to the usurper, are not even mentioned. What proceedings were had upon it does not appear.

Of the date of Edward the Sixth we find a precedent of a bill to quiet possession, and, under that of Elizabeth, of a bill to distinguish boundaries. Having thus noticed the principal points which occur of *proper* equitable cognizance, we shall only add, that those of mere arbitrary jurisdiction, though gradually becoming less frequent, are by no means of rare occurrence throughout the period which these proceedings occupy. Nothing like a distinction appears to have been yet established between the provinces of common law and equity, as to the possession of lands, and we find perpetually recurring instances of other matters of mere legal demand being removed by *certiorari* into the Court of Chancery.

This confusion of jurisdictions has long ceased; notwithstanding

which, there seems to be no limit, at least of necessity, to the encroachments which have been, and may yet be, made, in the name of the controlling and dispensing powers of equity, properly so called. It is not enough that there may have been, for some time past, a disinclination on the part of the Judges to encourage or to extend these encroachments. By means of those which have become already established, acting on the vast increase of the population, wealth, and commerce of the country, the business of our Courts of Equity has long very far exceeded their present means of disposing of it. Whatever may, for party purposes, have been urged to the contrary, this truth seems to be now at least pretty generally acknowledged, and few, we believe, will be found to contend that, if unnecessary delays have at any time been occasioned by over caution or timidity in one quarter of the judicial establishment, they have not been met in some other by a counterpoise of equally injurious tendency, or to dispute the corollary that the system, when administered by judges of average industry and promptitude, is far too burthensome for the courts as at present constituted. To meet this palpable deficiency in the means of justice, either additional judges must *toties quoties* (d) be appointed, or the system itself must be materially and fundamentally altered; for the result of the late laborious Chancery Commission, although not yet acted upon, must, we believe, with univereal assent, be taken to have demonstrated that the end cannot be answered by mere alterations in the forms and minutiae of practice. Of the two modes pointed out, the former seems the most expensive, the latter the most difficult and hazardous, and perhaps the most prudent course would be to proceed gradually with both; and thus the first step to be taken would be to place the Courts of Equity already existing on a footing of the greatest possible efficacy; the next, to inquire what parts of their present jurisdiction might be safely and beneficially retrenched; and lastly, to adopt such measures as may be requisite for the full and permanent relief of the suitors.

But whatever is to be done with reference to all or either of these most essential objects, it is absolutely necessary that those whose office it is to carry reform into effect, should begin by evincing a resolution to disregard the objections of interested opponents—a species of difficulty which has hitherto been suffered to have far too much influence in retarding the progress of improvement in every department, whether of church or state. The government of the country must look steadily at the great interests of the

(d) We are aware that this expression has been used in certain quarters for the purpose of ridicule, and are, nevertheless, content to adopt it in sober earnest.

public—the sacred trust which it is the duty of that government to discharge without favour or affection. And, though far from denying that the members of the legal profession constitute a very important branch of the public, we must yet remember that they constitute but a branch, and must not be allowed to flourish to the detriment of the root and stem through which they derive their nourishment. It is not unfrequently urged that, without the stimulus of those great prizes which the profession holds forth to the ambition and cupidity of adventurers in its lottery, the spirit of emulation and industry which now so pre-eminently distinguishes the English Bar would droop and languish, and the public interest suffer materially from the loss of dignity and importance sustained in so vital a part. All this we are free to admit, and yet cannot bring ourselves to consider that the delay—in many cases the denial—of justice to so many thousand suitors is an evil at all adequately compensated by the increased opportunity to half-a-dozen barristers of accumulating rapid fortunes, often at the sacrifice of health, and even of life itself, by means of the unnatural exertions which are rendered compulsory by the present system.

The improvement of the law itself must not, however, be lost sight of in the more immediate and urgent consideration of providing the means for the due administration of it; and to the subject of that improvement, so far as regards the system of a distinct equitable jurisdiction, it is our design that the present article may be regarded as only preliminary.

ART. II.—THE OBJECT OF PUNISHMENT.

1. *Oeuvres Complètes de Platon, traduites du Grec en Français.* Par V. Cousin, tom. 4. (Argument de Gorgias.) Paris 1827.
2. *Die Befugnisse des Staats in Hinsicht auf Rechtsverletzungen. Skizzirt von H. A. Vezin.* (*The Powers of the State with respect to Violations of the Law. Sketched by H. A. Vezin.*) Osnabrück, 1801, 12mo. pp. 40.
3. *Gallus Aloys Kleinschrod's systematische Entwicklung &c. des peinlichen Rechts.* (G. A. Kleinschrod's *Systematic Development &c. of Penal Law.*) Erlangen, 1805. 3d ed.
4. *Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts.* (*Compendium of Penal Law, as generally practised in Germany.*) Von P. J. A. Ritter von Feuerbach. 8vo. Giessen, 1823. 8th ed.

DOCTOR FRANKLIN, in one of his essays, relates a story of a "Cruel Turk in Barbary," who, whenever he purchased a Chris-

tian slave, ordered him immediately to be hung up by the legs, and to receive a hundred blows of a cudgel on the soles of his feet, that this foretaste of punishment, and the dread of incurring so severe a visitation in future, might prevent the faults that would deserve it. Something akin to this, but unquestionably an improvement upon it, is the system of prevention which has lately found favour with certain eminent persons, whose wisdom we cannot presume to doubt. It must be fresh in the recollection of our readers that one of the hereditary legislators and judges of the land declared, "that the object of setting spring guns was to deter from the commission of theft, and that object was as completely attained by hitting an innocent man as a guilty one." The same idea, under a somewhat different form, is to be found in the writings of the distinguished scholar and Platonist, Victor Cousin. The latter does not, indeed, go so far as to recommend the indiscriminate application of the bastinado or the spring gun, either by way of charitable admonition or politic precaution; but he maintains, in his argument to the *Gorgias* of Plato, that the punishment of innocence would create a much more terrible impression than the punishment of guilt, and would be full as efficacious in preventing crime.

"Les publicistes," he observes, "cherchent encore le fondement de la pénalité. Ceux qui se croient de grands politiques, le trouvent dans l'utilité de la peine pour ceux qui en sont les témoins, et qu'elle détourne du crime par la terreur de sa menace et sa vertu préventive; et c'est bien là, il est vrai, un des effets de la pénalité, mais ce n'est pas là son fondement; car la peine, en frappant l'innocent, produirait autant et plus de terreur encore, et serait tout aussi préventive."

As the other speculations of the learned Platonist upon the subject of punishment are equally striking, and deserve, for many reasons, the utmost degree of notoriety, and as we are apprehensive of marring their beauty by translation, we shall lay them before our readers in the author's own language.

"Ceux-là," he continues, "dans leurs prétentions à l'humanité, ne veulent voir la légitimité de la peine que dans son utilité pour celui qui la subit, dans sa vertu corrective; et c'est encore là, il est vrai, un des effets possibles de la peine, mais non pas son fondement; car, pour que la peine corrige, il faut qu'elle soit acceptée comme juste; il faut donc toujours en revenir à la justice. La justice, voilà le fondement véritable de la peine: l'utilité personnelle et sociale n'en est que la conséquence."

Cette théorie de la pénalité, en démontrant la fausseté, le caractère incomplet et exclusif des deux théories qui partagent les publicistes, les achève et les explique, et leur donne à toutes deux un centre et une base légitime. Elle n'est sans doute qu'indiquée dans Platon, mais elle s'y rencontre en plusieurs endroits, brièvement, mais positivement exprimée, et c'est sur elle que repose la théorie sublime de l'expiation. Puisque c'est une loi de l'ordre que toute injustice ait son châtimement, après s'être écarté de l'ordre en commettant une injustice, ce serait s'en écarter plus encore que de ne pas subir

la punition qu'il nous impose ; ce serait aggraver le désordre, et par conséquent la misère ; tout désordre étant misère, comme tout ordre est bonheur. En maintenant donc la justice distributive, la loi qui attache la peine à toute infraction à l'ordre, l'homme d'état donne au peuple une leçon salutaire, et travaille au bonheur même de celui qui est puni, puisqu'il le reconcilie avec lui-même, avec la société et la raison universelle. *Il est son ami, son bienfaiteur, sa providence*, et il est celle de l'Etat, puisqu'il y fait régner l'ordre legal et moral, qui représente l'ordre essentiel des choses.

Une géométrie sublime préside à l'harmonie des êtres ; l'égalité géométrique, pour parler comme Platon, est la loi de l'existence universelle, de la société humaine comme de la nature. Dans les sociétés humaines, l'égalité géométrique est la justice.

If the theory of punishment thus ascribed to Plato were really indicated in his writings, all our affectionate veneration for that great name would not prevent us from pronouncing it to be a most barren and unprofitable theory, equally at variance with the dictates of reason and experience ; and we should feel inclined to exclaim with Hudibras,—

Alas ! what is't us
Whether 'twas said by Trismegistus,
If it be nonsense, false, or mystic,
Or not intelligible, or sophistic ?

—an exclamation which, we candidly confess, is often ready to burst from our lips, upon perusing the day-dreams of modern Platonists. We shall presently, however, have an opportunity of shewing that a widely different theory, and one which, from the assertions of M. Cousin, we should be least likely to expect, is not merely indicated, but broadly propounded by Plato. True it is, that the doctrine of expiation, the tranquillizing and healing influence of punishment, and the necessity of its infliction in order to reconcile the wrongdoer to himself, are expressly inculcated in the *Gorgias*. But that these views may be rightly understood, and that we may be enabled to judge how far they are applicable, or were intended to be applied, to practical purposes, how useful to the statesman and the legislator in the consideration of punishment, it will be advisable to follow the philosopher a few steps in the development of his argument.

Injustice, he remarks, is a disease of the mind—punishment the cure for that disease.

“ When, therefore, a man has perpetrated a wrong, he ought to hasten, of his own accord, before the judge, as his physician, lest the disease become inveterate and incurable. Far from attempting to palliate the iniquities of himself, his parents, his friends, his children, or his country, he will be the first to denounce them ; not shunning detection, but laying bare the crime ; compelling himself and others boldly and intrepidly to court the punishment due to their misdeeds, whether it be the scourge, or fetters, or mulct, or banishment, or death ;—himself his own accuser and the

accuser of his dearest friends. (a) But if his enemy should commit a wrongful act, he will strive to the utmost and exhaust his ingenuity to the end that his enemy may not appear before the judge, and, if he does appear, that he may not be punished; that he may not disgorge his plunder when he has robbed, but enjoy unmolested the fruits of his injustice;—that he may not suffer death when his crime has merited it, but rather live the longest of lives, and, if possible, be immortal." (b)

Such is the train of reflection from which M. Cousin has extracted his "Théorie de la Pénalité." A pleasing and rather unusual social scheme, it must be confessed, is shadowed out by the philosopher. How moving a scene, how heart-refreshing it would be, to view the courts of justice thronged with self-accusing criminals, painting their own deeds in the blackest colours, invoking the vengeance of the laws upon their own heads, and conjuring the magistrates, for the love of God, to send them to the treadmill, the hulks, or the gallows!

"Thou rascal beadle, hold thy bloody hand;
Why dost thou lash that whore? Strip thine own back—"

So, no doubt, he would in this Utopia; and whore and beadle would emulously woo the lash in amiable conflict, and generous self-devotion. Let us imagine also the kind solicitude of anxious friends persuasively urging, or, perchance, benevolently dragging, their nearest and dearest kindred to the gaol or the gibbet, out of pure disinterested love.

"Clown. Master Barnardine! you must rise and be hanged, Master Barnardine.

(a) Ἐὰν δέ γε ἀδικήσῃ ἡ αὐτοῦ, ἢ ἄλλοστις ὧν ἂν κήδεται, αὐτὸν ἐκόντα εἶναι ἐκείσε ὅπου ὡς τάχιστα δώσει δίκην, παρὰ τὸν δικαστήν, ὥσπερ παρὰ τὸν λατρὸν, σπεύδοντα· ὅπως μὴ ἐγ-
χρόνισθῃν τὸ νόσημα τῆς ἀδικίας, ὑπου-
λον τὴν ψυχὴν ποιήσῃ καὶ ἀνίατον. Ἐπὶ
μὲν ἄρα τὸ ἀπολογεῖσθαι ὑπὲρ τῆς
ἀδικίας τῆς αὐτοῦ, ἢ γονέων, ἢ ἐταίρων,
ἢ παίδων, ἢ πατρίδος ἀδικούσης, οὐ
χρήσιμος οὐδὲν ἢ ῥητορικὴ ἡμῖν, ὡ
Πῶλε· εἰ μὴ εἰς τὴν ὑπολάβειν ἐπὶ τούναν-
τίον, κατηγορεῖν δεῖν, μάλιστα μὲν
ἑαυτοῦ, ἑπειτα δὲ καὶ τῶν οἰκείων, καὶ
τῶν ἄλλων, ὅς ἂν αἰεὶ τῶν φίλων
εὐτυχάνῃ ἀδικῶν· καὶ μὴ ἀποκρύπτεσθαι,
ἀλλ' εἰς τὸ φανερὸν ἀγειν τὸ ἀδικημα,
ἵνα ὧπ' δίκην, καὶ ὕγις γίνηται·
ἀναγκάζειν δὲ καὶ αὐτὸν καὶ τοὺς ἄλλους
μὴ ἀποδειλιάν, ἀλλὰ παρέχειν μύσαντα
καὶ ἀνδρείως, ὥσπερ τίμνειν καὶ κάειν
λατρῷ, τὸ ἀγαθὸν καὶ καλὸν διώκοντα,

μὴ ὑπολογιζόμενον τὸ ἀλγεῖνον, εἰάν
μὲν γε πληγῶν ἀξία ἡδίκηκός ἢ, τύπ-
τειν παρέχοντα· εἰάν δὲ δισμοῦ, δεῖν·
εἰάν δὲ ζημίας, ἀποτίνοντα· εἰάν δὲ
φυγῆς, φεύγοντα· εἰάν δὲ θανάτου,
ἀποθνήσκοντα· αὐτὸν· πρῶτον κατῆ-
γορον ὄντα καὶ αὐτοῦ καὶ τῶν ἄλλων
οἰκείων.

(b) Ἐὰν δὲ ἄλλον ἀδικῇ ὁ ἐχθρὸς,
παντὶ τρόπῳ παρασκευασίον, καὶ πρᾶτ-
τοντα καὶ λέγοντα, ὅπως μὴ διδῷ δίκην,
μηδὲ ἔλθῃ παρὰ τὸν δικαστήν· εἰάν δὲ
ἔλθῃ, μηχανητέον ὅπως ἂν διαφύγῃ
καὶ μὴ ὧπ' δίκην ὁ ἐχθρὸς· ἀλλ' εἰάν τε
χρυσίον ἥρπασκῷ ἢ πολὺ, μὴ ἀποδιδῶ
τούτου, ἀλλ' ἔχων ἀναλίσκεται καὶ εἰς
ἑαυτὸν καὶ εἰς τοὺς ἑαυτοῦ, ἀδίκως καὶ
αδίκως· εἰάν τε θανάτου ἀξία ἡδίκηκός
ἢ, ὅπως μὴ ἀποθάνειται· μάλιστα μὲν
μηδέποτε, ἀλλ' ἀθάνατος ἔσται, πονη-
ρος ὧν· εἰ δὲ μὴ, ὅπως ὡς πλείστον
χρονὸν βιώσειται τοιοῦτος ὧν.

" *Barnard.* Who are you ?

" *Clown.* Your friends, Sir, the hangmen ; you must be so good, Sir, as rise and be put to death."

Thus far the scene is Platonic. The sequel, indeed, is not in exact keeping ; for Master Barnardine, instead of hastening forth to greet his friend and benefactor,—*sa providence*, as M. Cousin would term him—in plainer language, the hangman, alleges the frivolous excuse that he is sleepy, and finally forms that most unreasonable and perverse of resolutions :—" I will not consent to die this day, that is certain. I swear I will not die to-day for any man's persuasion."

Our readers will scarcely misapprehend our meaning, or suppose that we are endeavouring to cast ridicule on the prince of ancient philosophers ; whose moral and political visions, when not obscured by the cabalistical conceits of the Pythagorean school, are of the purest and brightest order, pregnant with the most sublime and vital truths, at once instructive to the reason and captivating to the imagination. What we would combat—and ridicule is the fittest weapon for the purpose—is a perverted and spurious Platonism, that has lately sprung up among our continental neighbours,—an inept misapplication or exaggeration of the doctrines of Plato,—a morbid mysticism,—an attempt to substitute certain fanciful monsters of the mind, certain cobweb theories, for the stern realities of life,—to measure social institutions and social relations by a standard of ideal excellence,—to divert legislation from the pursuit of obvious good by the directest road, and bewilder it in a labyrinth of metaphysical and psychological subtleties.

Without pausing to examine whether the philosopher may not have been hurried, in his reflections upon the healing efficacy of expiation, somewhat beyond the limits of discretion, it may safely be asserted that upon this part of the *Gorgias* he never could have intended to found any theory of punishment. But there is a passage towards the conclusion of that dialogue, which might have suggested such a theory to his admirers. It runs thus :—" Whoever is rightly punished, is punished *either with a regard to his own amendment and benefit, or that he may serve as an example to others*, that they, witnessing his sufferings, may be struck with terror, and become better men. The persons benefited by punishment are those whose crimes are not of an inveterate cast ; but such as have reached the extreme of crime, and whose depravity is incurable, of these examples are made. They themselves derive no benefit from the punishment, for they are incorrigible ; but others are benefited *who behold them undergoing the most severe and fearful inflictions on account of their crimes.*" (c) This

(c) Προσέκει δι παντί τῇ ἐν τιμωρίᾳ ἡ βελτίωνι γίγνεσθαι καὶ ὀνίνασθαι, ἣ ὄντι, ὅν' ἄλλου ὀρθῶς τιμωρουμένου, παράδειγμά τι τοῖς ἄλλοις γίγνεσθαι.

is no solitary indication of the sentiments of Plato upon the subject of punishment; in the *Protagoras* he expresses himself to the same effect. "No one," he says, "in punishing a wrong-doer, fixes his attention exclusively upon the crime perpetrated, except such as wreak their vengeance like the brute that lacks reason. But he who punishes wisely, *punishes not with a view to the past*—for that which is done he cannot recal—but *out of regard to the future, that neither the criminal himself may again offend nor those who witness his punishment. He punishes, therefore, in order to deter from crime.*" (d) Again in the ninth book of *The Laws*:—"For no punishment is imposed by the law for the sake of inflicting evil; but one of two things it generally accomplishes; it renders the person suffering it either a better man, or less actively vicious. But," continues the philosopher, "where the crime is of such deep malignity that no hopes can be entertained of the offender's reformation, an infamous death must be his punishment, that his example may benefit others." (e) Again, in the eleventh book of *The Laws*:—"He is not to be punished with a view to the crime committed, for what is done cannot be undone, but for the sake of the future, that both he himself and those that behold his punishment may either utterly abhor crime, or that the evil may at least be of less frequent recurrence." (f) There is yet another passage in the ninth book of *The Laws*, wherein the same principles are stated with some slight variation in point of form. The author, having taken a distinction between *damage* and *wrong*, proceeds to say:—

"Whoever shall be guilty of a wrong, great or small, him the law shall teach and compel, *besides making reparation for the damage*, either abso-

ἵνα ἄλλοι ὁρῶντες πάσχοντα ἂν ἂν πάσχοι, φοβούμενοι, βελτίους γίνωνται, εἰσὶ δὲ οἱ μὲν ὠφελούμενοί τι καὶ δίκην διδόντες, οὗτοι οἱ δὲ ἄν λίσσιμα ἀμαρτήματα ἀμαρτῶσιν· οἱ δ' ἂν τὰ ἐσχάτα ἀδικήσωσι, καὶ διὰ τοιαῦτα ἀδικήματα ἀνίατοι γίνονται, ἐκ τούτων τὰ παραδείγματα γίνονται. καὶ οὗτοι, αὐτοὶ μὲν οὐκ ἐτι δύνανται οὐδέν, ἀτε ἀνίατοι ὄντες ἄλλοι δὲ ὀνίανται, οἱ τούτους ὁρῶντες διὰ τὰς ἀμαρτίας τὰ μάλιστα καὶ ὀδυνηρότατα καὶ φοβερώτατα πᾶσι πάσχοντες.

(d) Οὐδεὶς γὰρ κολάζει τὴν ἀδικίαν, ἀλλὰ τὴν τῶν ὀνίων, καὶ τῶν ἐνέκων, ὅτι ἡδικῶσιν, ὅτις μὴ ὥσπερ θηρίον ἀλογιστὶ τιμωρεῖται· ὁ δὲ μετὰ λόγον ἐπιχειρῶν κολάζειν, οὐ τὴν παρελθούσαν ἀδικίαν, ἀλλὰ τὴν ἐνέκων ἀδικίαν τιμωρεῖται· (οὐ γὰρ ἂν τογὲ πρᾶχθαι ἀγενήτων θείη)

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ἀλλὰ τὴν μελλούσαν χάριν, ἵνα μὴ αὐτὸς ἀδικῇ, καὶ αὐτὸς οὐτός, μὴτε ἄλλος ὁ τούτων ὄντων κολασθέντα. —ἀποτροπῆς ἢ ἐνέκων κολάζει. Protag. 324.

(e) Οὐ γὰρ ἐπὶ κακῇ δίκῃ γίνονται οὐδὲμία γιγνομένη κατὰ νόμον, οὐδὲν δὲ θάνατον ἀπεργάζεται σχεδόν, ἢ γὰρ βελτίονα ἢ μοχθηρότερον ἦτον ἐξαιργάσατο τὸν τὴν δίκην παρασχόντα. —δίκη δὲ τούτῃ θάνατος, —τὴν δὲ ἄλλως παραδειγμα ὀνίσει, γενομένης ἀδικίας, καὶ ὑπὲρ τὴν τῆς χάριτος ὄντων ἀφανισθεῖς. νομ. 9. p. 854.

(f) Οὐχ ἐνέκων τῇ ἐκαστοῦ γίνονται τὴν δίκην (οὐ γὰρ τὸ γεγονός ἀγένητον ἔστι ποτὶ) τοῦ δ' εἰς τὸν αὐτὸν ἀδικῶν χρόνον ἢ τὸ παραπᾶν μισῆσαι τὴν ἀδικίαν αὐτὸν τε καὶ τοὺς ἰδόντας αὐτὸν δικαιούμενον, ἢ λωφῆσαι μὲρ πολλὰ τῆς τοιαύτης ἐμφορᾶς. νομ. 11. p. 934

2 B

lutely to refrain for the future from the voluntary commission of the like act, or to do it much less frequently. And whatever be the means, whether it be by actions or words, pleasures or pains, honour or dishonour, mulct or reward, that men can be induced to hate injustice, or to love, or at least not hate the nature of justice; this is the business of perfect laws. But where the legislator shall perceive the offender to be incurable, there he shall ordain the utmost extremity of punishment, convinced that to such persons life can be no longer advantageous, and that their death will doubly benefit society, inasmuch as they will serve as an example to others not to act unjustly, and will also relieve the state of its noxious members; he will therefore, in the case of these (incurable) offences, but in no other case, appoint death as the punishment." (g)

Thus, then, it would appear that Plato himself is exposed to the double edge of M. Cousin's sarcasm. He is not merely one of those infatuated persons, *qui se croient de grands politiques*, who imagine that the legitimate aim of punishment is to deter from the commission of crime; but he belongs also to the number of those who, *dans leurs prétentions à l'humanité*, think that regard should be had to the reformation of the criminal. The repetition of the same sentiment in so many passages, and the earnest tone and language of those passages, prove sufficiently that it was no transient or hastily-formed notion that floated in the mind of the philosopher, but the result of serious conviction. Prone as he is on ordinary occasions to yield to the seductions of a warm and discursive imagination, and to wander from argument into metaphor, he is here as plain, as little figurative, as the severest criticism could require. We have no allusion to the *sublime geometry* mentioned by M. Cousin, no metaphysical parallelograms, no charge to the magistrate to restore, by the infliction of punishment, the social propor-

(g) "Ὅ τι τις ἀν ἀδικίᾳ μέγα ἢ συμ-
κρον, ὁ νόμος αὐτὸν διδάξει καὶ ἀναγ-
εῖναι το πᾶσαν ἐπαύθῃς το τοιοῦτον
ἢ μηδεποτέ ἐκόντα τολμῆσαι ποιῆν, ἢ
διαφερόντως ἤττον πολὺ, πρὸς τῇ τῆς
βλαβῆς ἐκτίσει· τὰυτα εἴτε ἐργοῖς ἢ
λογοῖς, ———. Ὅν δ' ἀν ἀνίατὼς εἰς
ταῦτα ἔχοντα αἰσθῆται νομοθετῆς,
διέειν τοῦτοισι καὶ νόμον (θάνατον)
θήσει τινα· γίγνησκων πού τοις τοι-
οῦτοις πασιν ὡς· ὅν· αὐτοῖς ἐπὶ ζῆν
ἀμεινον, τοὺς τι ἀλλοὺς ἀν διπλῇ
ὀφελουιν ἀπαλλάττουμενοι τοῦ βίου,
παράδειγμα μὲν τοῦ μὴ ἀδικεῖν τοῖς
ἀλλοῖς γινομενοι, πρῶτοντες δὲ ἀνδρῶν
κακῶν ἐρημον τὴν πόλιν, &c. νομ. θ.
p. 862.

This passage is peculiarly remark-
able, because it slightly touches upon
two points which have engaged the
attention of very few among the nu-

merous subsequent writers upon the
subject. In the first place, it alludes
to *reparation for damage received*; and, in the next, it would seem to
distinguish between punishment pro-
perly so called, and discipline, or
the correction of the offender. Mr.
Taylor, following the example of
Ficinus, renders the words *πρὸς τῇ
τῆς βλαβῆς ἐκτίσει*, "through the
dread of the consequent punishment,"
altogether unmindful of the dis-
tinction just taken by the philosopher
between *βλαβῆ*, *damage*, and *ἀδικία*,
wrong. It may here be observed,
that the total want of critical accu-
racy in Mr. Taylor's translation (the
only entire translation that exists in
English) renders it wholly unavailable
for the purpose of quotation.

tions, to renew the moral equilibrium, or to attune the harmony of beings (*l'harmonie des êtres.*) The principles insisted upon are strictly practical:—that punishments should be prospective, and not retrospective; that they are not intended as a satisfaction for the past, but as a security for the future; not vindictive, but preventive; that the prevention of crime is to be effected by correcting the offender himself, and by deterring others from the commission of similar offences; that where the first object is wholly unattainable, and the offender is not to be reclaimed, he should be removed from society, and thus incapacitated from violating its rights; and that by these means the second object may at least be compassed, and the severity of the punishment operate as a salutary example.

It clearly never occurred to Plato, that the punishment of innocence would be altogether as efficacious in preventing crime as the chastisement of guilt: this notable discovery was reserved for modern times. We confess that we felt disposed to leave the cruel Turk of Barbary, the hereditary legislator, and M. Cousin in the undisturbed enjoyment of their respective theories of prevention; but since the present article was commenced, a work has fallen into our hands, which induces us to offer a few words upon this point. The work we allude to is an Essay upon the Penal System in general, and the Punishment of Death in particular, by M. Lucas, which has gained the prize both at Paris and at Geneva, and has excited considerable attention abroad. In it M. Lucas quotes the words of M. Cousin, and advocates the doctrine therein contained with considerable triumph, and no small affectation of logic. “On tue le meurtrier,” he observes, “non pas parce qu’il à tué, ce qui ne serait que de la vengeance, mais afin qu’on ne tue plus. Avec ce système il n’y a pas de raison pour qu’on ne frappe aussi bien l’innocent que le coupable; car puisque l’exemple est le but, et la terreur le moyen, la peine, comme l’observe M. Cousin (*Argument de Gorgias*) en frappant l’innocent produirait autant et plus de terreur, et serait tout aussi préventive.” (*k*)

Let us see how the matter stands. That the punishment of the innocent would produce a greater degree of terror than the punishment of the guilty is not to be disputed; inasmuch as it would necessarily create universal dismay and consternation, shaking the very foundations of society, and destroying that sense of personal security, the maintenance of which should be the chief business of government. But would it produce a wholesome terror, a terror which would scare the weak and the profligate from the commission of offences? Would it operate upon the fears of the calculating villain, and counteract the attractions of crime, and the

(*k*) Du Système Pénal et du Sys- de Mort en particulier. Ouvrage
tème Répressif en général, de la Peine couronné à Genève et à Paris. p. 212.

hopes of impunity? Certainly not. The terrors of guilt would diminish in exact proportion to the increased apprehensions of society at large. How then would such punishment be preventive? Let us suppose that M. Lucas witnessed the execution of a man for a murder of which he was innocent. Putting all moral repugnance out of the question, what would be the train of reflections suggested by such a spectacle? "This hanging," he would say, "must be extremely disagreeable. By heavens, I feel a crick in my neck at the bare thoughts of it. But how am I to shun the halter? I will keep my hands from blood. No; there is no safety in that. The man who has just suffered was guiltless of blood; he is not suspended between heaven and earth, because, as a great lawyer expresses it, he is unfit for either, but because a murder has been committed, and some person must be hanged for it. Well then, as such is the case, and as the victim is indifferent, I may hope, and indeed not unreasonably expect that, if I should chance to commit a murder, some one else may be hanged for it."

Seriously speaking, the necessity which exists, that the crime, the criminal, and the punishment should be inseparably associated in the public mind, in order to produce upon it a salutary impression, and thus to deter from the violation of the laws, is so strikingly obvious, that we feel almost ashamed to insist upon what may sound like a mere truism. And it is surely to be regretted that, through an overstraining at originality, through the fascinations of paradox, or that heedless impetuosity with which warm and enthusiastic minds will sometimes pursue a favourite doctrine, the distinguished writers abovementioned should have been tempted to risk their well-earned reputation by arraying themselves against a truth so self-evident.

Having rescued Plato from the misdirected admiration of M. Cousin, we shall now turn our attention to the theory of punishment, propounded by the philosopher, of which, as far as we have the means of judging, he may be considered the original author. It will be interesting to examine the various modifications which this theory has undergone in the hands of subsequent writers. We learn from Aulus Gellius, (1) that Taurus, in a Commentary upon the *Gorgias*, enumerates, as if upon the authority of Plato, three distinct motives for the infliction of punishment: namely, admonition or correction (*νουθεσία, κόλασις, or παραινεσις*), example (*παράδειγμα*), and a third (*τιμωρία*), which is interpreted a satisfaction to the dignity and authority of the person outraged, where it is essential that that authority should be maintained, and where impunity would beget contempt. This signification of the latter word

(1) Noct. Att. 6. 14.

which Aulus Gellius attributes to those "qui vocabula ista curiosius diviserunt," was a refinement unknown to Plato, for, as it appears by the passages already quoted, he uses *κόλασις* and *τιμωρία* as almost equivalent terms for punishment generally. Aristotle, indeed, draws a distinction between the two words, explaining the former as having for its object the advantage of the person punished, the latter, the gratification of vindictive feeling on the part of the person punishing (*m*). But this exposition involves no consideration of the dignity of the person injured; and as to vengeance, it is expressly excluded by Plato from the view of the legislator in the denunciation of punishment. With respect to the doctrine itself, which Aulus Gellius ascribes to Taurus and other philosophers, it is clear that what is merely one of the many *subjects of crime* has been here mistaken for a main *object of punishment*. The dignity and authority of certain members of the state are no doubt entitled to the protection of the laws; but so also is the life, the liberty, the property of every individual, so is the public peace, the public health, &c.; and yet no one will maintain that the preservation of the public health is the immediate end of punishment generally.

The only other writers of antiquity, with whose works we are acquainted, who have treated of punishment with a view to its object, are Seneca and Lactantius; and these have adopted unreservedly the sentiments and language of Plato. Seneca, indeed, thus far differs from his prototype, that he states, as a third distinct object of punishment, what Plato rather regarded as a necessary consequence of extreme exemplary inflictions; the security, namely, accruing to society from the removal of its noxious members. (*n*) It is to be observed also that both Seneca and Lactantius, in rendering the celebrated passage from the *Protagoras*, have failed, (*pace tantorum vivorum* be it said) to give the full and precise meaning of the Athenian philosopher. "Nam, ut Plato ait," says Seneca, (*o*) "nemo prudens punit quia peccatum est, sed ne peccetur." The same version is given by Lactantius. (*p*) Now it must be obvious to any one who directs

(*m*) Rhetor. 1. 10. 4. Διαφέρει δὲ τιμωρία καὶ κόλασις· ἡ μὲν γὰρ κόλασις τῷ πασχόντι ἐνεκα εἶναι· ἡ δὲ τιμωρία, τῷ ποιῶντι, ἵνα ἀποκληρωθῇ. It is scarcely necessary to observe that Aristotle is not here discussing the proper and justifiable object of punishment; but describing the different motives by which men are actuated.

(*n*) Transeamus ad alienas inju-

rias: in quibus vindicandis hæc tria lex secuta est, quæ princeps quoque sequi debet: aut ut eum, quem punit, emendet; aut ut pœna ejus ceteros meliores reddat; aut ut, sublatiis malis, securiores ceteri vivant.—*De Clementia*, lib. i, c. 22. See also *De Ira*, lib. i, c. 6, and c. 16.

(*o*) De Ira, lib. i, c. 16.

(*p*) De Ira Dei, s. 18.

his attention to the subject, that the words *quia peccatum est* convey a very inadequate and unsatisfactory, nay, more, an erroneous impression of the meaning of the phrase *προς ταυτη τον νεν εχων, και ταυτη ινακα οτι ηδωκεσεν*. This is no idle or captious criticism; for to the interpretation in question may be traced a grand sophism, which has excited much controversy and confusion of ideas among the moderns, which has been extravagantly lauded by some, and mercilessly ridiculed by others; and, to escape the absurdity of which Messrs. Cousin and Lucas have hurried headlong into the opposite extreme. We allude to the doctrine which was embodied and applied in the famous speech of the English Judge to the horse-stealer:—"Man, thou art not to be hanged for stealing a horse, but that horses may not be stolen:" a speech about as rational as if a surgeon were to address his patient, whose leg had been shot off,—"Sir, I do not apply a dressing to your stump, because you have lost your leg, but that you may not bleed to death."

It is not surprising that Selden should express himself dissatisfied with the doctrine of Plato thus expounded. The opinions of this acute writer upon the subject of punishment are the more entitled to attention, because he unravels the mystery of the above fallacy, and places the question upon its right footing. He argues that it is of the very essence of punishment, properly so called, that it should have a reference to the past and be inflicted *for* some crime or fault; that, in all cases, it is partly at least retributive, although it be at the same time medicinal, or directed to the amendment of the offender himself and others; and that every penal infliction, as far as it partakes of the common nature and character of punishment, is imposed, not only to guard against future crime, but *because* crime has been already committed. "For," he continues, "the *formal cause* of punishment certainly consists principally in this, that it be avenging (*τιμωρια* seu *vindicta*) and *satisfactory*, or *purgatory*, or *expiatory*, or in some other way bearing relation to the crime or offence committed; and hence punishments are sometimes rightly termed expiations ordained by law (*λυσεις νενομισμεναι*); which name evidently refers to the act committed, and not to future amendment, which is only one of the *final causes* of punishment." (p) Here then we have a dis-

(p) *Formalis enim poenae causa certo in hoc maxime consistit quod sit τιμωρια seu vindicta, atque satisfactoria, seu purgatoria, seu expiatoria, aliterve scelus seu peccatum commissum respiciat; unde et poenae rectè dicuntur interdum λυσεις νενομισμεναι, expiationes seu liberationes a*

lege praestitutæ, quod nomen planè id quod commissum est, non emendationem futuram, quæ in finalibus tantum poenæ causis habetur, respicit.—Seld. de Jure Nat. et Gentium juxta Disciplinam Ebraeorum, lib. i. c. 4.

inction drawn, and that very properly, between the *formal* and the *final* cause of punishment, or, in other words, between its cause and its object. Plato, it is manifest, refers solely to the latter; which is, in truth, the only consideration that falls within the legitimate scope of the legislator, or can lead to any beneficial result. Whether every punishment be, from its nature, and *ex vi termini*, *retributive*, *expiatory*, or *purgatory*, can be a matter of very little importance, in an examination of the end to which it is directed. The point is, not what may be the preliminary condition under which all punishment is inflicted, but what the legislator is to aim at, what is the object upon which he is to fix his attention in ordaining punishments. Few persons will be disposed to deny, that every punishment necessarily pre-supposes an *infraction* of some law, and is thus far *retributive*,—that the law, or the power establishing the law, is satisfied by its infliction, and that thus far it is *satisfactory*,—that the offender, by suffering the punishment, wipes away the offence, and frees himself from any farther imputation on the same account, and that it is thus far a *purgation*, or *expiation ordained by law* (λασις νομοισμενα). At the same time, it is clear that Selden, in laying so much stress upon these terms, had peculiarly in contemplation divine punishment, and punishment under the Mosaic dispensation.

The opinion of Grotius evidently coincides upon the whole with that of Plato; but his definition of the ends of punishment is singularly defective and inconsistent, and calculated rather to perplex than to elucidate the question. He states that the object of punishment is either the advantage of the offender himself or of him whose interest it was that the offence should not have been committed, or of any persons indifferently; (q) and he proceeds to explain each of the branches of this definition in detail. To the first of these ends, he observes, is directed all punishment that is corrective and admonitory, or that tends to the reformation of the offender. With respect to the second, he says:—"The advantage of him whose interest it was that the offence should not have been committed consists in this, that he shall not be liable to sustain a similar injury in future, either at the hands of the same person or of others. There are three modes of securing him from injury at the hands of the same person; the first is to remove the delinquent from society: the second, to deprive him of the power of doing mischief: the third, to teach him by suffering not to transgress again, which is connected with his reformation. In order to shield the person wronged from future outrage at the

(q) Dicemus ergo in pœnis respici esse, aut indistincte quorumlibet.—
aut utilitatem ejus qui peccavit, aut De Jure Belli ac Pacis, lib. ii. c. 20,
ejus cujus intererat non peccatum s. 6, 2.

hands of others, it is necessary that the punishment should be public, conspicuous, and exemplary." The third end, or *the advantage of any persons indifferently*, he describes to be attainable by the same means as the second.

A very short examination of the above definition will suffice to demonstrate its imperfection. We are told that there are three objects of punishment; the natural inference is, that these three objects are distinct: that one is not a mere corollary from the other, but that they are to be effected by means, if not differing in themselves, at least operating in a different manner. Now, by the author's own exposition of the clauses of his definition, it appears that the second and third objects are, to a certain extent, necessary consequences of the first; or, in other words, that the security of the person wronged, and of all other members of society, as far as regards the first offender, must be the necessary result of the offender's reformation. This produces a degree of confusion which is highly prejudicial, as tending to mislead the mind in the choice and apportionment of punishments, for which alone, be it observed, can any inquiry into the ends of punishment be valuable. It appears, moreover, that the second and third objects are stated to be attainable by the same means operating in precisely the same manner. One course, in short, is to be taken in the pursuit of both; so that the distinction between them is superfluous; nor indeed does any such distinction exist in fact. It is to the advantage of the state that crime should be prevented generally, and that the person and property of all its members indiscriminately should remain inviolate. It has no separate interest in the security of the individual who has already received an injury, nor has that individual a greater claim upon its protection than any other member of society. It inflicts punishment upon the aggressor, not for the purpose of preventing him from injuring the person whom he has before outraged, but from injuring any person whatever. The two latter objects, therefore, constitute in the contemplation of the law one and the same end; namely, the future security of all the members of the state from the aggressions of their fellow-citizens; and if we admit this to be an *immediate* object of punishment, it needs must be the *only* one, for in that case, the first which Grotius mentions,—the amendment of the criminal,—can be considered as only one of the means for attaining that end.

The subject of punishment has been discussed by Hobbes, in various parts of his works, with his usual boldness and vigour of thought. In the *Leviathan* he defines punishment to be "an evil inflicted by public authority on him that hath done or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the

better be disposed to obedience." (r) And from this definition, among other inferences, he deduces the following:—"That all evil which is inflicted without intention or possibility of disposing the delinquent, or, by his example, other men, to obey the laws, is not punishment, *but an act of hostility*." It is curious to observe how even strong minds are sometimes startled by strong expressions, how reluctant we are to call things by their right names, how ready to chime in with those gentle ones, who, like the clown in the play, "will use the devil himself with courtesy." Puffendorf objects to this expression (*factum hostile*) of Hobbes, as too strong to designate an act sanctioned by the laws. But if the genuine, legitimate end of punishment be, to dispose men to obey the laws, or, in other words, to prevent offences—a position which is maintained by none more positively than by Puffendorf (s) himself,—all evil inflicted *without the intention or possibility of effecting this*, is, although sanctioned by the laws, an act of tyranny, of wanton, unprofitable cruelty; it is an abuse, for purposes of ill, of that power which was conferred for purposes of good; a legal outrage, and therefore the greater outrage; an act of blind and reckless passion; and why not an act of hostility (*factum hostile*)?

The doctrine of Plato has been assumed in substance by almost all modern writers upon law. Some, and those not the least distinguished, have adopted it without addition or qualification, regarding the prevention of crimes by means of correction, incapacitation, and example, as the sole end of punishment. Of this number are Bernardi (t), Servin (u), Beccaria (a), Risi (y), Filangieri (x), Carmignani (a), Wieland (b), Gmelin (c), Kleinschrod (d), Blackstone (e), Paley (f), and a host of

(r) Ch. 98. The English version of Hobbes himself has been adopted in the text; although it must be granted, that in this instance it is somewhat ambiguously worded, and wants the conciseness of the Latin:—"Pena malum est, transgressori legis autoritate publica inflictum eo fine, ut terrore ejus voluntates civium ad obedientiam conformentur." See also c. 30. "De Cive," c. 3. s. 11, and "De Corpore politico," p. 1. c. 3. s. 10. where the words of Plato are almost echoed.

(s) "Cæterum genuinus penarum finis est præcautio læsionum." De Jure Nat. et Gent. lib. viii. c. 3. s. 9. et alibi.

(t) Discours. Tit. ii. s. 1.

(u) De la législation criminelle, c. i. art. 1. s. 1.

(x) Dei Delitti e delle Pene. c. xv.

(y) Animadversiones ad Crim. Jurisprud. pertinentes. t. ii.

(z) Scienza della Legislazione. l. iii. c. 27.

(a) Juris Optim. Elementa. vol. i. s. 283, et sequ.

(b) Geist der peinlichen Gesetze.

(c) Grundsätze der Gesetzgebung s. 23.

(d) Systematische Entwicklung. 2 Th. s. 45.

(e) 4. Comm. p. 11.

(f) Prin. of Moral Philosophy, vol. ii. p. 274.

others (g). Some writers have extended their views beyond the immediate design of punishment to that which is its ultimate object; and of this number is Heineccius. "Nor will it be difficult," he says, "to determine what is the end of punishment from the very reason which makes it requisite. For, since punishment, properly so called, took its rise upon the introduction of civil government, and the right of inflicting it is one of the imminent rights of civil majesty, the end of which is nothing else but the security of subjects, the consequence is that the same must be the end of punishments." (h)

This idea has been still farther developed by Vexin in his "Sketch," a work of most unpretending and attractive bulk, written with admirable clearness and simplicity, and containing views upon the subject before us that well merit our attention. The question which the author proposes to himself is, "What are the powers with which the state is invested, as regards those who violate its rights, or the rights of its members?" In order to solve this question, we must understand whence the state derives its rights and its powers. It holds them by virtue of the social pact, a contract not to be sought in history, but in nature. Man in his natural state possessed nought but the right of uncontrolled existence, with its necessary concomitants, the rights of self-preservation and self-defence. He could arrogate to himself no power to inflict evil upon his fellow-man for any act, however heinous in itself, which did not infringe upon his inherent rights. He entered into the social state that he might enjoy his right of existence with greater convenience and certainty. The sole aim and end of the social pact was the security arising from mutual aid and protection. Now it is manifest that the state or social body could acquire nothing but what was ceded to it by the individual members composing it; and these latter could bestow nothing save what they possessed. The utmost extent therefore of the rights and powers of the state can only consist of the aggregate of the rights and powers originally possessed by its component parts. Consequently it only has the power to shield

(g) We are by no means prepared to assert that all these writers use the same words to express ideas substantially the same. A multitude of verbal subtleties and over-nice distinctions have been started, especially by the Germans, as to the proper term by which the end of punishments is to be designated. Objection has been made to the expression *prevention of crime*, as signifying *anticipation*; for which

purpose no power is entitled to inflict punishment. Many other similar cavils have been broached, an examination of which would be a bootless task. All the above authors, however, are agreed that the future absence or unfrequency of crime is the object of all punishment, and that this object is to be attained by the means mentioned in the text.

(h) Elem. Juris Naturæ et Gentium, lib. ii. s. 160.

itself and its members from all violation of their respective rights—to guard the general and individual security. It can have no authority to inflict suffering for any act, simply because it is evil. All that it can do in the exercise of its legitimate powers is to hinder such evil acts as necessarily must endanger the general security. The general security then is the basis of all authority in the magistrate, the fundamental principle of penal law, the sole measure as well as object of penal inflictions.

Such is the substance of Vein's argument. All that can be observed upon it is, that "*the public security*" is, in its widest acceptance, a phrase of very large import. The public security unquestionably ought to be the object of all the dispositions of the legislator, of all the acts of the magistrate, and consequently of punishment among the rest; it is the *ultimate* aim of punishment, but we have still to seek for some *proximate* object, something to which punishment may more immediately and pointedly tend. If, however, we restrict the meaning of the term, and signify no more by it than the absence of crime, and the inviolability of rights, *security* may readily be admitted to be the single object of punishment.

A third class of modern writers, to which Von Globig and Huster(i), Bentham(k) and Colquhoun(l) belong, place *reparation* or *compensation* among the ends of punishment:—among the *subordinate* ends, indeed; for all concur in regarding the *prevention of future crimes*, which concerns not only the individual wronged, but the whole body of the state,(m) as the

(i) Abhandlung von der Criminal-Gesetzgebung. p. 50. An admirable Essay written in the purest spirit of humanity, the joint production of V. Globig and Huster, which gained the prize proposed by the Economical Society of Beme, in 1777, for the best treatise on Criminal Legislation. It may here be mentioned that Voltaire and an advocate of the parliament of Paris (Elie de Beaumont) contributed anonymously fifty louis d'or each towards the foundation of this prize. Von Globig has since distinguished himself by several works on jurisprudence. He died a short time ago, having lived to recant some of the humane doctrines inculcated in the above Essay, into which he was hurried, as he himself declares, by the contagious enthusiasm of Beccaria. Swift somewhere observes, that the latter part of a

wise man's life is taken up in curing the follies, prejudices, and false opinions he had contracted in the former. He might have added, that the latter part of the lives of most of us is employed in bending and fashioning our earlier and purer feelings and principles, to fit the standard of worldly prudence.

(k) Theorie des Peines, l. i. c. 3. Morals and Legislation, c. 15. ss. 14. 21.

(l) A Treatise on the Police of the Metropolis, p. 20.

(m) "Le but principal des peines c'est de prévenir des délits semblables. L'affaire passée n'est qu'un point; l'avenir est infini. Le délit passé ne concerne qu'un individu; les délits pareils peuvent les affecter tous."—Bentham Traites de Legislation, t. ii. p. 2. c. 1.

paramount object. The difficulty of admitting reparation to be one of the ends of punishment consists in the circumstance, that in very many instances of crime, reparation is absolutely inconceivable; the impossibility of remedying the past arising, not from any accidental defect on the part of the criminal, but from the nature of the crime itself. Pecuniary punishments *might* unquestionably, and they alone *could* with much effect, be applied to the purpose of compensating or alleviating the losses and sufferings of the injured; for as to forced labour and servitude, which have sometimes been recommended as applicable to this object, the latter is too much at variance with modern habits and feelings, and forced labour, in any other shape, would be far too unproductive to furnish us with an equivalent. But, even where the injury sustained admits of reparation, and where pecuniary punishment might be eligible, the quantity of reparation must of necessity depend upon the condition and means of the criminal, and must therefore always be fluctuating and uncertain. The question then is, whether *that* can be stated to be one of the ends or objects of punishment generally, which is often wholly and essentially impracticable: which, even where no moral impossibility exists, must constantly be incomplete in character, as well as amount, and ever varying: and which, at best, can only be effected by one species of punishment. Tittmann(*n*) and Kleinschrod(*o*) decide the question in the negative. "Punishment," says the latter, "concerns the welfare of society at large; reparation the advantage only of the party injured. By punishment we endeavour to guard against future evil; by compensation to remedy the past. The one is the creature of positive law; the other founded in natural equity. Compensation for damage sustained may be relinquished by private agreement; punishment allows of no such remission." It is to be observed, however, that, although this author excludes reparation from the number of the ends of punishment, he lays especial stress upon the expediency of combining the two, whenever it is possible; and his words are somewhat remarkable. "If," says he, "the person injured is not restored to his former state, the majority of the people will hold the punishment to be useless. 'What boots it me,' says the man that has been robbed, 'that the thief is hanged, if I do not recover my property?' In order, then, that the effect of the punishment may be augmented, and that the public may be convinced of its necessity, let the judge at the same time pronounce judgment of compensation, or *let him choose such a punishment as shall not only attain its own proper object, but shall be directed also to the indemnification of the injured party.*" (*p*)

(*n*) Handbuch der Strafrechtswissenschaft. Abschn. 53.

(*o*) Abschn. 8. 50.
(*p*) Abschn. 41.

This is subtilizing with some degree of nicety, it must be confessed. Many persons would rashly suspect that an event, to which a particular course of action is directed, might be considered not perhaps as the principal end or object, but at least *one of the ends or objects* of that course of action. But no! "Learn to distinguish," says Lessing's *Young Pedant*; "when I revile my father, it is not *qua* father, but in respect of his being a fool. If a father cudgels his son, the son may *certo respectu* belabour him in his turn; but then he must take special care, as he lays on his blows, to present to his mind's eye, not the *father*, but the *aggressor*." In the present case, also, we must learn to distinguish: the purpose, to which punishment is directed for the public welfare, is an *object* of punishment: *that*, to which it is directed for private satisfaction, is something else, a desirable result, a consummation devoutly to be wished, a *semi-end*, a *quasi-object*, but no perfect *end* or *object*. It may be so. Without, however, adopting this cobweb distinction, we freely acknowledge, that we entertain considerable doubt whether, in any degree or under any circumstances, the penal sanction of the laws should be destined to the purpose of procuring indemnification to the party injured; or whether it is expedient that the legislator should suffer individual interests to enter at all into his calculation in the selection and apportionment of punishments. The infinite future, and the all-embracing welfare of the community, we are disposed to think, should exclusively absorb his attention; and no reference should be had to the past, except so far as may be necessary to establish that analogy between the offence and the punishment, which may render the latter more instinctively present to the mind, more sensibly felt, and more generally impressive. To assign to private compensation a place among the ends of punishment, would serve little purpose but to distract and embarrass the views of the legislator in the pursuit of his grand object.

But it will be said, that whoever sustains a wrong has an undoubted claim to reparation for that wrong. There are those, indeed, who will maintain, and perhaps not wholly without reason, that as an inevitable consequence of the protection which the community owes to all its members, the innocent sufferer has a right to demand reparation from the state itself. If so, the obligation on the part of the state is absolute and invariable, and exists without relation to the condition or means of the offender; nay, even where the criminal remains undiscovered, or escapes from justice, and no sort of punishment ensues, the claim on the one hand, and the obligation on the other, continue in full force. Here, therefore, punishment would clearly not be the source from whence compensation would spring. But supposing that the

immediate sufferer by a crime has no such widely-extending claim, and that it is the aggressor to whom he is in all cases to look for amends, it by no means necessarily follows that punishment is the only or the fittest instrument for enforcing his demand. What benefit can it be to him that his individual indemnification should be mixed up or associated with the public infliction? that it should be specifically ordained by the penal law, or constitute a part of the penal sentence? except, indeed, where the amount of compensation is to be precisely the same as the amount of punishment, and where large emolument may therefore reasonably be expected from that tendency to severity, which characterizes most penal codes. The Jewish law against theft, which denounced, as the punishment, seven-fold restitution (*q*), was without doubt singularly grateful to the cupidity of injured parties. So also, in a less degree, was the 37 Hen. 8. c. 6. (repealed last year), entitled "The Bill for burning of frames;" which was enacted also for the better prevention "of a new damnable kind of vice, displeasure, and damnifying of the King's true subjects, and the common wealth of this realm, as cutting out of dams of stews, &c.; cutting off conduit heads; burning of carts loaden with coals; burning of heaps of wood; cutting out of beasts' tongues; cutting off the ears of the King's subjects; barking of apple trees, &c.; and divers other like kinds of miserable offences, to the great displeasure of Almighty God, and of the King's Majesty;" and which gave treble damages to the party aggrieved. But if fair and equitable compensation be all that is required, a penal sentence could effect no more for the person outraged than what is to be accomplished by the French mode of proceeding; which, although it greatly facilitates the indemnification of the sufferer, yet keeps the private claim and the public penalty studiously and religiously apart. Our readers are probably aware that in France any person, who is injured by a crime, is entitled either to institute a suit for damages, on his own account, against the criminal, or to come in and prefer his claim under the shadow of the public prosecution for the breach of the laws (*intervenir sur les poursuites du ministère public*). One advantage attending this practice is, that the private sufferer is thus rendered independent of the vigilance and activity of the public functionary,

(*q*) The law is thus stated in Proverbs, c. vi. "Men do not despise a thief if he steal to satisfy his soul when he is hungry; but if he be found, he shall restore seven-fold; he shall give all the substance of his house." In Exodus, c. xxii. the penalty is declared to be "five oxen

for an ox, and four sheep for a sheep," if the thief should have killed or sold the stolen ox or sheep; and two-fold restitution, "if the theft be found in his hand." To which is added:—"If he have nothing, then he shall be sold for his theft."

and therefore the chances of reparation are increased. Another is, that he is enabled to pursue his claim against the property of the offender in the hands of his representatives, should the offender himself have died, whereas public opinion would loudly condemn the continuance of a criminal prosecution against a dead man. (r)

In refusing to reparation a place among the ends of punishment, we are far from insensible to the force of the arguments adduced to prove the necessity of such satisfaction in all cases where it is possible. The necessity cannot be disputed. The person injured has a positive right to compensation; but this, like every other right, he must exert his own energies to maintain. All that the legislator is bound to do is, to furnish him with the readiest means for the purpose, to smooth his path, to remove all vexatious obstacles, and to facilitate to the utmost the vindication of the right. Thus far the duty of the legislator indubitably extends; but in providing for the maintenance of rights, he appears to be acting in a very different character, and with other immediate views, than when denouncing penal inflictions for wrongs; and we are inclined to be of opinion, that it is essential to the simplicity

(r) Our own law carries this principle to an absurd extent, determining, to use Lord Mansfield's words (Cowp. 373,) that "*all private criminal injuries or wrongs*, as well as all public crimes, are buried with the offender. According to the maxim *actio personalis moritur cum persona*, no action for a wrong, such as trespass, battery, slander, &c. can be originated or revived by or against the personal representatives, except in cases of trespass which come under the provisions of 4 Edw. 3. c. 7, and except where property is actually acquired by the wrong-doer. The reason assigned for the practice is as absurd as the practice itself:—"For," says Blackstone, "neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury." Might it not be argued, by the same species of logic, in an action arising *ex contractu*, which does descend to the representatives, as, for instance, in *assumpsit* for work

and labour, "that neither the executors of the plaintiff performed any work or labour, nor those of the defendant contracted to pay for any work or labour, in their own personal capacity?" Blackstone says that actions *ex contractu* "are rather against the property than the person; but surely all civil actions are against the property; and if actual damage is sustained, why should not the property of the wrong-doer be liable, whether he or the person sustaining the damage live or die? Suppose, for example, a person in consequence of violent battery is obliged to be under a doctor's hands for some time; and that before he brings his action, or pending the action, he or the assailant should happen to die; why should the doctor's charges on this sole account be paid out of the property of the person assaulted, either in his own hands, or in those of his representatives? The answer of the pleader is ready:—"Because this is a case of *tort*;" and who will venture to dispute so valid a reason?

and uniformity of the laws that these two provinces should be kept distinct.

There is yet another species of satisfaction, which is classed by Bentham among the secondary objects of punishment:—"A kind of collateral end," he says, (s) "which it (punishment) has a natural tendency to answer, is that of affording a pleasure or satisfaction to the party injured, where there is one, and, in general, to persons whose ill will, whether on a self-regarding account, or on the account of sympathy or antipathy, has been excited by the offence." This pleasurable feeling, which the author has in another place (t) aptly compared to the honey gathered by Samson from the carcase of the lion—the sweet from the terrible—and the vindictive longing which it is to allay and gratify, may be condemned by over fastidious moralists, who affect and preach super-human tenderness and placability; but the feelings in themselves, when kept under wholesome control, are in no degree censurable, and their public utility, as a spring of action, can scarcely be denied. "It is this vindictive satisfaction that loosens the tongue of the witness; it is this that animates the accuser, and enlists him in the service of justice, regardless of the inconvenience, the expense, the enmities to which he exposes himself; it is this that surmounts the public compassion at the punishment of the guilty." (u) But is it to be considered one of the ends of punishment? or, in other words, is a regard to it to influence the conduct of the legislator in the choice, adaptation, or apportionment of punishment? The author is cautiously guarded in his expressions upon the subject. "This purpose," he says, "as far as it can be answered *gratis*, is a beneficial one. But no punishment ought to be allotted merely to this purpose, because (setting aside its effects in the way of control) no such pleasure is ever produced by punishment as can be equivalent to the pain. The punishment, however, which is allotted to the other purpose, *ought, as far as it can be done without expense, to be accommodated to this.*" (v) And elsewhere he observes:—"The least excess devoted to this object would be a superfluous evil. Inflict the befitting punishment; it is for the party injured to draw from it that measure of enjoyment which his situation admits, and of which his nature is susceptible. Nevertheless, without adding a particle to the severity of the punishment with a view to this object, *certain modifications may be given to it*, according to the sentiments which the injured party may be supposed to

(s) *Morals and Legislation*, c. xiii.
s. 2. note.

(t) *Traité de Législation*, t. ii.
p. 2. c. 16.

(u) *Traité de Législation*, t. ii.
p. 2. c. 16.

(v) *Morals and Legislation*, loc.
cit.

entertain, either with reference to his position, or to the particular nature of the crime." (w)

It is almost needless to observe, that satisfaction thus administered to a party injured can scarcely with propriety be regarded as one of the ends of punishment, according to the meaning which we affix to the term. Such vindictive gratification rather appears to be a consequence, and an inevitable consequence, of the right selection and application of punishment. Whether the legislator is permitted to *modify* or *accommodate* punishment with a view to this object, or to take any measures to secure its accomplishment, may well be doubted. Fortunately no such efforts are required; for of this we may be assured, that if the penalty denounced by the law possess all the other qualifications requisite for the attainment of its "*immediate principal end*," its infliction will infallibly produce as large a share of the dissocial pleasure in question, as can either be serviceable to the person experiencing it, or consistent with the well-being of society.

We can only afford a few words in this place to Feuerbach's deservedly popular treatise.(x) To it, and to Kleinschrod's candid and philosophical work, we shall have frequent occasion to refer, in discussing the principles of criminal law; both writers, if not unerring guides, are at least invaluable assistants. With respect to the matter of our immediate inquiry, the opinion of Feuerbach coincides in all essential points with that of the majority of his predecessors. He analyses his subject, however, with a degree of critical minuteness, which to many will appear somewhat over-curious. "The indispensable chief object," he remarks, "of every punishment is to deter all from crime by its threat." (y) It is to be observed, that both this author (x) and Kleinschrod (a) draw a distinction between the object of the *threat* and the object of the *infliction*—the former being to deter men from crime, the latter to establish the reality, and ensure the efficacy of the threat. Among the possible secondary or collateral objects (*Nebenswecke*), Feuerbach classes immediate intimidation by means of the spectacle of infliction; the security of the state from future transgressions on the part of the offender, and the *legal* reformation of the person punished. (b) He employs the term *legal* reformation in contradistinction to *moral* reformation, which latter he expressly excludes from the number of the ends of punishment, as belonging more properly to the province of dis-

(w) *Traité de Législation*, loc. cit.

(x) We have selected this work of Feuerbach's, in preference to his "*Revision der Grundsätze des positiven peinlichen Rechts*," as ex-

pressing his views in a more condensed form, and as having the advantage of his last corrections.

(y) s. 133.

(x) s. 16.

(a) Abschn. 45.

(b) s. 133.

cipline (*Züchtigung*). (c) Something like an approach to such a distinction we have already noticed as discoverable in one of the passages quoted from Plato. (d) Strictly speaking, indeed, the moral amendment of the offender would seem rather to appertain to those measures of police, which are to regulate and modify the application of the punishment, than to punishment itself. It assuredly is not the object of the penal *threat*; it *may* be that of the particular mode and circumstances by which effect is given to the threat. But it is no less certainly the duty of the legislator—a sacred duty—to employ all the means within the range of his legitimate powers, to accomplish the moral as well as the legal reformation of the offender; and the friends of humanity will lament, that if the punishment which is directed to the one object, is too often inoperative, the chastening discipline which is designed to accomplish the other is equally liable to failure. (e)

It would extend the present article beyond all reasonable limits, were we to attempt to discriminate the many various shades of opinion that have prevailed upon a subject so important to the legislator, and so interesting to the philosophic observer. The principal diversities, those that are most entitled to attention from their own intrinsic weight, or the authority of the names by which they are recommended, have been examined. A few general re-

(c) s. 18. (d) See p. 360, note g.

(e) A striking illustration of this melancholy fact is furnished by the Report of the select committee appointed to inquire into the increase of crime. Mr. Orridge, who has been for nearly thirty years governor of the goal and House of Correction at Bury St. Edmunds, seems to place very little faith in the moral improvement which prison discipline, carried to its utmost perfection, is capable of producing. He states, in his evidence before the committee, "that hypocrisy goes to a great extent in prison; that there are many whom he has never known properly till he had no power over them; that a complete scoundrel conceals himself. 'I had thought that, after thirty years, I had a knowledge of criminal character; but I believe I shall die a novice at last.'" The evidence of Sir J. Graham is to the same purpose. In answer to the question—"Have you made any ob-

servation generally on the effect of prison discipline in the gaol of Carlisle?" he says, "I have; and the result of that observation, coupled with inquiries from persons who have had great experience, led me to think, that in very few cases is a gaol ever a place of reform: we have reason to know that the best conducted prisoners are those who are anxious to obtain a mitigation of their sentence by their good conduct within the walls of the prison; and in many cases a portion of their sentence has been remitted in consequence of such good conduct, and within a very short period those very individuals have committed fresh crimes of a deeper die." "So that you are of opinion that, generally speaking, the good conduct of prisoners is not to be attributed to any real reformation in their character?" "Most decidedly." The entire Report is to be found at the end of this Number.

flections, which naturally spring out of that examination, will find their proper place here ; and, in offering them, we shall be as brief as possible.

Of the right to inflict punishment little requires to be said. The existence of such a right in the state is one of the first political axioms : the duty of protection, and the right of repelling external aggression, are not more incontrovertible. The only question is, what are the considerations which are to regulate and govern the exercise of the right ? That moral justice is not one of those considerations,—that it is neither the foundation, the measure, nor the end of punishment, may be very confidently asserted, notwithstanding the authority of M. Cousin. No punishment is inflicted because it is just, but because it is necessary ; nor is it necessary because it is just ; but it is just because necessary. Hundreds of actions, indifferent in themselves, are prohibited and punished in every state, because the temporary interest of the state requires it : whilst, on the other hand, every breach of a moral obligation is a breach of justice, and yet no one will assert that every such breach is a fit subject for punishment. But do we therefore affirm that punishment may violate the principles of justice ? By no means : the interest of the state can never by possibility require that it should. The truth is, that legislation is as distinct from morals as it is from religion ; it cannot outrage the one or the other with impunity ; but he who would confound all distinctions, and constitute morals or religion the invariable canon of legislation, would do well to prepare himself for the task, by twisting a few ropes of sand, and extracting sunbeams from cucumbers.

The internal security of the social body, collectively and in all its parts, is the foundation of all punishment, the measure of its intensity, and its grand ultimate object. Its proximate object is the prevention or discouragement of offences. It is not inflicted for the sake of moral retribution, or to render the evil suffered commensurate with the evil perpetrated ; nor for purposes of vengeance : it is inflicted for the avoidance of future evil. The person punished is not, as some have objected, an arbitrary instrument in the hands of the state, destined to purchase, by his sufferings, advantages for others. He is punished *because* he has violated the law. The law menaces a certain act with certain pains ; when that act is perpetrated, the punishment denounced is an inevitable legal consequence. The offender, by infringing the law, subjects himself to the threatened penalty ; nor can he complain, if the evil inflicted upon him be made the means of increasing the general good, or diminishing the general mass of evil. It results, however, from the principles laid down, that every excess of punishment, beyond what is absolutely necessary to the public

security, is so much superfluous and irreparable evil—a wanton abuse of the powers of government, or, to use the expression of Hobbes, an *act of hostility*.

In conclusion, we may sum up the ends of punishment in the words of the prefatory edict to the Chinese code: (f)—“The chief ends proposed by the institution of punishments have been to guard against violence and injury, to repress inordinate desires, and to secure the peace and tranquillity of an honest and unoffending community.” (g)

ART. III.—MEDICAL JURISPRUDENCE.

1. *The Principles of Forensic Medicine systematically arranged and applied to British Practice*. By John Gordon Smith, M.D. Underwood. 1827.
2. *An Analysis of Medical Evidence*. By J. G. Smith, M.D. Underwood. 1825.
3. *Medical Jurisprudence*. By J. A. Paris, M.D. &c. &c. and J. S. M. Fonblanque, Esq. Barrister at Law. Phillips. 1823.
4. *Elements of Medical Jurisprudence*. By T. R. Beck, M.D. Edited by N. Dunlop. Anderson. 1825.

AMONG the many indications of an improved state of legal knowledge, and of the more general and extended studies of legal practitioners, we may reckon as one, that a science hitherto neglected in this, though long since a subject of research in many other countries, has lately emerged into notice. No profession requires such multifarious knowledge as that of a lawyer: to-day he is engaged in a horse cause; farcy and glanders, spavins and splints, must be as household words to him: to-morrow he has an action against underwriters; all the technicalities of seamanship and navigation must be, or must be assumed to be, at his fingers' ends: the next is the infraction of a patent, in the construction, let us say, of a steam engine; what a range does this offer to the possession or affectation of science! unfortunately the affectation is generally held sufficient, and in the old time it was so; for if

(f) Pref. Edict of the Emperor Kaung-Hee, Ta Tsing Leu Lee, or Code of China, Prelim. Mat-67.

In the Gentoo Code, punishment is most imposingly personified:—“Punishment is the magis-

trate; Punishment is the Inspirer of terror; Punishment is the Defender from calamity; Punishment is the Guardian of those that sleep; Punishment, with a black aspect and a red eye, terrifies the guilty.” Ch. 21. Sec. 8.

the advocate could collect a few technicalities from his brief, or contrive to get *crammed* at consultation, he seldom failed to astonish an ignorant auditory by the profundity of his supposed knowledge. But by-standers are becoming more knowing every day: those useful institutions, which are now opening the paths of science, not to the middle ranks of society alone, but directly and indirectly to the mere workman, will very shortly enable the auditors in a court of justice to form a better estimate of the abilities of the bar and of the judgment of the bench. We have heard of a judge who owed much of his success as an advocate, during the late war, to the little nauticality which he was enabled to pick up in occasional trips from Billingsgate to the Nore; he could speak to a sailor in his own tongue; he could make himself understood by his own witness, and cross examine his adversaries to manifest advantage. On the other hand, we heard Lord Eldon, in an injunction case, ask Sir Samuel Romilly the difference between soda and sub-carbonate of soda, when neither that very learned advocate, nor any other of the counsel in the cause, could satisfy the doubt of the Lord Chancellor. Such and many similar instances of ignorance, in matters now constituting the ordinary studies of every well-educated gentleman, were then of little importance; all men are blind in the dark, but day-light is now breaking even in the halls of justice; and as spectators can now see, or soon will see, the nakedness of the place, it becomes highly expedient as quickly as possible to clothe it with some decent covering, even if we cannot command some splendid ornaments. The lawyer of the old school opposes this; the special pleader can draw his declaration, at least so he tells you, the equity draftsman can frame his injunction bill quite as well without understanding one word of its extra-legal subject, as if he had Newton or Wollaston, Davy, Astley Cooper, Halford, Maton, Paris, Watt, Rennie, Brunel, Hamilton Moore, or Cockburn, the lights of science and the adepts of art, sitting in dictation at his elbow. "Besides," says the veteran of the year-books, "who is to find time for all these nicnackeries, these *atic*s and *ologies*? stick to your precedents, young man—copy! copy! make indexes, compile digests, common-place the statutes, or if you must study, meditate on the Term Reports, and make yourself master of the Veseys. There's Viner's Abridgement for you, twenty-four volumes, and Comyn's Digest, eighty; is not that enough learning for you? but you must be wasting your time and your money at lectures and institutions. I made my money by precedent, why should not you do the same?"

In vain the young aspirant represents that the times have changed: the senior is inflexible; he has stood still and forgotten, or never knew, that the world was moving.

The race, however, is fast dying away : a few juniors, allured by the example of their wealth, and undeterred by the exposure of their stupidity, may yet, for a little while, follow the beaten track, till they find, when it is too late, that others have opened a new, shorter, and broader road for themselves ; that the law which they practised as an art has become a science ; that new studies have led to the discovery of new principles ; new principles to improved practice ; that their venerated dogmas have been exploded as useless absurdities ; and that the legislature, following the light which it could not extinguish, has at last given its stamp to a reformed jurisprudence, and that they must—horrible thought !—burn their books and go to school again. (a)

To avert this fate from the tyros of our time, we exhort them diligently to pursue those branches of science which the reasonable spirit of the time is daily rendering more and more popular : they cannot, it is true, become absolutely learned in physic, minutely knowing in anatomy, perfectly accurate in chemical analysis, mathematically correct in mechanical contrivance ; but they may yet learn enough of each of these to be enabled, when a case presents itself, turning upon any of them, to master so much of the subject as may be necessary to their purposes, within the very moderate time which may be allowed them. An advocate ungrounded in general principles cannot do this ; he must blunder on in his ignorance, and the client must be sacrificed to the defective education of his counsel.

Of all others, the lawyer who practises in the Criminal Courts stands most in need of that branch of instruction, to which this paper specially alludes. An assize never passes, scarcely a day elapses, but that, at the police offices, at coroners' inquests, or before magistrates, the necessity of, not hearing only, but of understanding medical evidence, becomes apparent. The application, therefore, of medical science to judicial purposes cannot be doubted, nor can it long remain a question, whether medical jurisprudence is or is not a necessary ingredient in the studies of an advocate.

And now that we have used a title, the propriety of which has been not a little controverted, we may digress for a moment to consider its application : not that we view this as a matter of any material importance : neither the name nor the arrangement of an infant science, for so this must be still considered in England,

(a) A late learned professor, talking to one of the juniors of the bar who was advocating some new reform of the law, exclaimed most pathetically, "Alas, you know not what you do, young man ! if you carry this

point, what is to become of all the books ?" and then, after a pause, yet more piteously, "What is to become of my book ?"

Quis talia fando —

concern us much ; it is enough at present to collect our facts ; we may sort and docket them afterwards. The branch of which we write has been with, we believe, a single exception, and must in its nature always be, principally occupied by medical men ; *esprit de corps* has very naturally induced them to consider medicine as the material ingredient in the compound, which must form the title of their works ; they therefore put Medicine substantively, adding an adjective to denote the relation of the work to legal subjects. Thus we have Legal Medicine, State Medicine, (b) Forensic Medicine ; none of which terms convey to our minds that which we deem the object of the science—the application of medical knowledge to the general purposes of jurisprudence, which we need scarcely add are much more extensive than the business of the courts or forum. It being, therefore, the application of medicine to law, and not of law to medicine, we make the auxiliary science adjective, and the main object substantive.

Whether the arrangement of a work should be formed on a medical or legal division, provided there be a very good index, by which we may be assured of finding what we want, is equally a subject of indifference to us ; each mode has its advantage of facility of reference to the respective professions : and, therefore, we have seen much earnest, and almost angry, discussion on this head on the part of our medical brethren, who, be it said in all kindness, are not famous for the coolness of their controversy.

This science of medical jurisprudence, then, appears to have been first cultivated by the Italians. The *Quæstiones Medico-Legales* of Paulus Zacchias, published in Rome in 1621, remain to this day a monument of the elaborate research of that eminent physician ; the great number of ecclesiastical questions treated in this and other works of similar origin may serve in some measure to explain, why this branch of medical science had, at so early a period, when compared with the rest of Europe, excited the attention of Transalpine professors. The strict discipline of the church required that many minute points of regulation should be established on medical principles ; thus we find under the head *De Jejuniis et Quadresimis*, nine questions occupying twenty-six closely printed folio pages ; there are six questions *De Officiis Divinis*. *De Irregularitate* is divided into eleven heads, and then again are subdivided into many very nice sections, as *Nasi Magnitudo, aut Exilitas notabilis inducit Irregularitatem*. *De Clausura Monasterii* has sixteen questions. We have also *De Miraculis, De Resignatione Beneficiorum, De Tabacco, Chacalata, et Aqua*

(b) In Dublin, they have a State Apothecary and a State Hair-dresser, which signifies that these functiona-

ries operate on the head and body of the Lord Lieutenant.

Vitæ, in Jejunio, and many other questions of equal ecclesiastical importance.

The disposition of the clergy, also, to minute intermeddlings with the domestic concerns of mankind, afforded another stimulus to a course of study, in which every nice distinction of habit, disease, conformation, or idiosyncrasy might raise a new point of casuistry, and furnish a fresh pretence for priestly interference: thus the invalidity of marriage, *propter impotentiam*, has been held to be a subject peculiarly fitted for ecclesiastical cognizance, as may be learned from the State Trials, in the case of the Earl and Countess of Essex, or from *Valentini's Pandects*, where the marriage of a certain German prince, *bombardæ ictu eviratus*, furnished many years' discussion to half the universities of Europe, the more rigid churchmen holding that such a contract was sacrilegious.

The still celebrated work of the Spanish Jesuit *Sanchez, De Matrimonio*, will yet further elucidate this proposition: 408 double-columned folio pages of closely printed text are occupied in the discussion of all the possible cases, distinctions, and differences which the nicest casuistry, the most ingeniously polemic faculty of splitting hairs, could detect in so fertile a subject. Less reverential critics might ascribe it to other causes than the abstract love of science or disputation, that the latter subdivision of medico-legal knowledge should have been so peculiarly a favourite study among the priesthood; even our own great reformer, Martin Luther, appears to have been deeply imbued with it. We shall content ourselves with believing, that the reverend fathers of the church entered upon this dangerous investigation with purely speculative and spiritual views, and that, if their ideas were ever distracted by it to any sublunary concerns, it was only to the increase of the honour, power, and glory of the church, by contriving usurpations of ecclesiastical jurisdiction.

It may easily be conceived that such works as those of *Zacchias, Sanchez*, and others of this semi-clerical school, when the mind was fettered within the limits of papistical dogmas, do not furnish to the student of the present day any considerable mass of scientific information; their practical use is indeed small, but to the philosopher and medical professor they afford an ample field for wonder and speculation. *Quisquis Pauli Zacchiæ opus legere cum fructu voluerit, insigni jam rerum medicarum notitia instructus sit oportet; eo magis quod alia sit modernæ medicinæ facies; ditissimus enim thesaurus est liber iste, supplendus tamen subinde ex aliis fontibus recentioribus.* Cameronius. Syst. Caut. Med.

Zacchias, however, though the most celebrated, was not the first of the ponderous writers on medico-legal subjects; in 1601 *Bonaventura* published above one thousand folio pages! *De Na-*

turâ Partus octomensis, adversus Vulgarem Opinionem, libri decem. But vulgar errors possess a tenacity of life which even this ponderous volume could not destroy: half the old women of both sexes, in the three kingdoms, will still maintain that a child may be born at seven, but not at eight months; and the House of Lords was lately occupied for many days, without adding very profitably to the mass of either legal or medical knowledge, in an endeavour to determine the legal period of parturition; sundry gossips examined and were examined, sundry elderly ladies declared their opinions and experiences, and the usual discrepancy of medical testimony, where the zeal of the partizan is confounded with the impartiality of the witness, was exposed, to the great detriment of the profession; yet we will venture to predict, that the decision of the Gardener Peerage (of the propriety of which, as respecting the individual case, we entertain no doubt) will not have added a single iota to our certainty on the subject of uterogestation.

Numerous other Italian writers, as *Fortunatus Fidelis, Ammannus*, have added to the list of medico-legal authorities; and some of our best information is derived from their works, especially from the more recent publication of *Tortosa*.

On a subject offering such ample opportunity for elaborate research and curious development, it is not to be supposed that the Germans would be unemployed; from *John Bohn, De Renunciatione Vulnerum* 1689, and *De Officio Medici duplici, clinico et forensi* 1704, to the present day, almost innumerable works have issued from their press; among these the dissertations of *Zittman, Teichmeyer, Richter, Hebenstreit, Plenck, Kannegeiser, Alberti, Valentini, Frank, and Sikora*, are the most conspicuous; they abound in information, and we have only to lament that they are overlaid by their verbosity. The *Bibliotheca Juris* of *Struvius*, the *Bibliothèque Medicale* of *Plouquet*, the *Collectio Opusculorum* of *Schlegel*, and *Wilberg's Bibliotheca Medicinæ Publicæ*,^(c) must serve as guides to those who are inclined to investigate this numerous catalogue.

It was not till nearly the close of the last century that the French medical writers gave to the subject the attention it deserved; a few works on detached parts of the science by the justly celebrated *Ambrose Paré, Gendri, Blegni, Deveaux, Chaussier, Petit, and Louis*, filled the interval from 1575 to 1790, about which period the learned Professor *Mahon*, in conjunction with

(c) Dr. Gordon Smith informs his readers that this work (which comes no lower than 1819, and is defective,) contains 2013 works on Medical Police, and 2980 on Forensic Medicine:

averaging these at two volumes each, the amount will be 9986, which Dr. Smith thinks will be under the real mark.

several other writers, published the *Encyclopédie Methodique*; This was succeeded, in 1796, by the most perfect work yet possessed on the subject by any nation, the *Medicine Légale* of Foderé. From that time a rapid succession of lego-medical authors enriched the stores and evidenced the diligence of our neighbours: the works of Vigné, Mahon, Belloc, Marc, Capuron, and Orfila successively appeared; most of them are too well known to the medical and scientific reader to require description; it may be enough to say that, as respecting the general subject, Foderé, for his treatise on poison, Orfila, and for midwifery, Capuron, are the most perfect; the others have their several excellencies, which we are by no means inclined to undervalue; but to the student, whose library may of necessity be circumscribed, and whose time must be occupied by variety of study, we should in the first instance recommend the diligent perusal of these works. We are not aware that any of them, except Orfila, have been translated, nor do we advise any of our countrymen to undertake the task; first, because we doubt whether even Foderé would sell, for in this country bulk is a serious impediment to circulation; an author must be succinct if he hopes to be successful; our taste inclines to terseness, and, if it did not, the price of paper and printing would compress us into conciseness. The generality of foreign writers, on the contrary, indulge in the luxury of diffuseness without stint or measure; they pour forth their ideas in the fullest confidence that their reader will be as happy in perusing as they in promulgating opinions, and they clothe each idea in a maximum of words, without fearing the consumption of paper which may be necessary to its development. For this and other reasons, the translation of foreign works is usually a tedious, unprofitable, and not often a creditable task; and it is better that the student, even at a little extra expenditure of time and labour, should be driven to read approved works in their original language, and thereby retain with greater certainty, what he has acquired with some little difficulty, than that our trunkmakers should be supplied by the labour of our translators.

England long remained behind in this branch of science; Dr. Farre, indeed, published a small work in 1788, Dr. Robertson "A Treatise on Medical Police," in 1808, and Dr. Bartley "A Treatise on Forensic Medicine," in 1815; several works also appeared upon detached parts of the subject, as that of Dr. Hunter "On the Uncertainty of the Signs of Murder in the case of Bastard Children," Dr. Haslam and Dr. Burrough on Insanity, Dr. Hutchinson on Infanticide; but the merit of having produced the first general work on the "Elements of Juridical or Forensic Medicine," was reserved for Dr. Male in 1816-18.

In 1803 a Professorship of Medical Jurisprudence was founded

by his late Majesty, in the University of Edinburgh; but neither Oxford nor Cambridge has yet made this branch a subject of study, although it is obviously better adapted to the general studies pursued in each, than any other subdivision of medical learning. It interests not the student in physic alone, but all who, as advocates, justices of the peace, or even jurymen, may be called upon in future life to practise before the Courts or aid in the administration of the laws. The establishment of Downing College, Cambridge, appears to us peculiarly suited to its introduction; for there, the professors of law and medicine uniting in a course of lectures, might, without inconvenience and with every assurance of a numerous attendance, virtually establish a joint professorship of medical jurisprudence.

The years 1822-3 appear to have been those in which the most decided attention was paid to this science. In the former year Dr. Gordon Smith published his very able work on "*The Principles of Forensic Medicine*;" (d) and the latter was marked by the novel design of associating a physician and an advocate in the labour of compiling a more complete system than had hitherto appeared. The work of Paris and Fonblanque, though somewhat too voluminous and over-burthened with legal details, contains the greatest mass of information that has yet been offered to the student in this country: the natural aids which medicine and jurisprudence are capable of affording to each other are most clearly demonstrated, and even the alternate arrangement of the legal and medical branches of the subject, which may at first sight appear disorderly and unsystematic, is attended with this convenience, that both professions are thereby enabled to find with greater facility the information which they may require. For a book of reference, however, three volumes are inconvenient; we must therefore endeavour to impress it upon these gentlemen, that in a future edition they will best consult their own interest and the wishes of the public, if they concentrate their labours in a single volume. We do not mean to assert that the appendix, which occupies so large a space in the third volume, and of which we now recommend the omission, is without its interest; some very curious and some useful knowledge is contained in it, which the

(d) A learned physician on the other side of the Atlantic was contemporaneously employed upon this interesting and useful subject. In 1823 Dr. Beck published at New York his *Elements of Medical Jurisprudence*; and an English edition, edited by M. Dunlop, appeared here in 1824. This work, which we shall probably have frequent occasion to

quote, appears to hold an intermediate place between the two British publications with which we mention it: more ample in its materials than Gordon Smith, it is less miscellaneous in its details than Paris and Fonblanque. and for both these reasons may be recommended to the medical student.

student could have found only in turning over many dusty and ponderous folios of ancient learning; but these, once rescued from obscurity in the first edition, it can scarcely be necessary to repeat in a second. We shall probably come to a similar conclusion as to that part of the first volume which treats of the functions and privileges of the three medical corporations, the College of Physicians, the College of Surgeons, and the Apothecaries' Company; but on this point we must suspend our opinion; for there are wars and rumours of wars in the faculty of physic, and, until the now engendering controversy is decided, we cannot pronounce that the history of former differences is altogether useless. One observation we will make in the mean time. Our authors, both members of an English university, appear to us to take up the cause of the College of Physicians in rather a higher tone than the nature and conduct of that corporation, however learned and respectable, seems to warrant; and it unfortunately happened that their work had scarcely passed the press, when an incident occurred which is calculated to lower the pretensions of the College in public opinion. We allude to the election of Dr. Southey as a Fellow (*quasi*) on royal mandate. The rule had been, that none, but Graduates of the English Universities, or of Dublin, should be admitted, and there was some reason in this restriction; but as it was found too severe, and the judges had intimated an opinion that the by-laws in this respect required revision, an expedient was resorted to, which, while it appeared to be framed in pursuance of the suggestion of the judicial authorities, still left the matter complained of nearly in the same state as before. The President was enabled once in every two years to propose a Doctor of Physic of a certain standing, and, if approved by the College, he might be admitted a Fellow. This would have been a reasonable regulation, if there had been any intention of acting upon it *bonâ fide*. The President would then have held himself bound to nominate, from time to time, and without favour or affection, the licentiates most eminent for learning and for the extent and success of their practice; this however has not been done. In one or two instances the President is said to have availed himself of his privilege; but for the most part it has remained a mere dead letter.

It must be in the memory of many that, during the late reign, strenuous attempts were made to introduce Sir Walter Farquhar, then a celebrated and favourite court physician, into the College; but these attempts failed. His Majesty King George the Third had not a medical secretary: it was therefore reserved for the present reign to see a Fellow, not celebrated for the extent or success of his practice, not famed for any scientific acquirements, discovery, or publication, imposed upon the College on the sole ground of court favour. From the moment that the Corporation of Physicians submitted to this influence, they lost the high

grounds on which their advocates had endeavoured to place them ; they ceased to be the inflexible guardians of the principles transmitted to them by their predecessors, that none should be admitted but those who were graduates of the three Universities. They had not adopted the reasonable rule of relaxing the rigour of their by-laws in favour of superior talent ; but they sacrificed their independance to a petty intrigue. We need scarcely point out the use which may be made of this transaction by the opponents of the College in any future contest.

The licentiates, however, appear to be as unreasonable in their demands as the College in its refusal : without having passed through the gradations, which for ages have been known to all medical men as the required qualification for the rank of Fellow, without showing that their superior ability or success entitles them to be made exceptions to the strict rule, they expect *per saltum* to be admitted to the rank, which others have attained after a long probation and considerable expense. The unlicensed practitioners are yet more violent in their pretensions ; because they have purchased degrees at Aberdeen or St. Andrew's, or obtained them with little pains at Edinburgh or Glasgow, they consider themselves entitled to practise in London. The Scotch bar asserts no claim to plead in the English Courts ; the ministers of the Kirk do not consider themselves aggrieved, because they cannot mount the English pulpits ; but the Scotch doctors raise an immoderate outcry, because the College of Physicians threatens to forbid their practice in London, under a penalty of 5*l.* per month, which is the utmost extent of their jurisdiction. This is called the College monopoly : at least we suppose it is to this circumstance that its adversaries allude, when they raise against it that obnoxious cry ; for it is notorious, that in point of professional emolument, very many of the licentiates may compete with the majority of the Fellows ; we very much doubt, indeed, whether any sick person of sound mind ever paused, in his selection of a physician, to inquire whether his proposed adviser was a member of the Royal College.

In the College of Surgeons also there is an impending feud, and apparently better grounded than that among the physicians ; we greatly dislike all close corporations, and as the leading surgeons have brought their College within that denomination by the method of self-election in their court or council, we shall rejoice when the wholesome light of public investigation is let into their conclave. We feel, indeed, a particular interest as to the manner in which the Hunterian Museum is said to have been mis-managed. Parliament, it is said, granted 15,000*l.* for the purchase of this collection, and no less than 25,000*l.* more for the buildings in Lincoln's-Inn-Fields. It might have been expected

that some public benefit was to be secured in return for this public munificence; at present, however, we are unable to trace any such result: even to the regular students the museum is almost useless from the rapid manner in which they are hurried through it, the inconsiderable number of days on which it is open to them, and the want of a proper catalogue. Reform, it is true, has been promised on all these points, since public attention has been drawn to them; but the long existence of the abuses proves, that the legislature should be more careful in reposing trust in the hands of irresponsible corporations. We will not enter into the minor grievances alleged by the commonalty of surgeons and surgeon-apothecaries against the MAGNATES who have usurped the high places, nor into the discussions, conducted with somewhat too much of scurrility on the one hand, and excessive arrogance on the other; but we earnestly recommend the conclave to remember that close corporations are becoming unfashionable, and those which would retain their power must use it very meekly.

The less assuming Society of Apothecaries has been somewhat more fortunate than the superior Colleges; for though it has been accused, unjustly as we think, of undue severity in enforcing the regulation of the statute 55 Geo. 3. c. 19, which prohibits practice to those who have not been examined and approved, (e)

(e) The number of unqualified practitioners, especially in the neighbourhood of the manufacturing towns, is still exceedingly great, and daily inconvenience and danger results to the lower orders, by whom they are principally employed, from their gross ignorance. It ought to be more generally known, that no person can recover in any action for medicines administered, unless he is certificated by the Apothecaries' Company, or was in practice previous to 1815, and the *onus probandi* is on the plaintiff.

While noticing this act, we must not omit an instance of the absurd but favourite practice of our legislation. "And whereas," says the statute, "it is the duty of every person using or exercising the art and mystery of an apothecary, to prepare with exactness and to dispense such medicines as may be directed for the sick by any physician, lawfully licensed to practise physic by the president and commonalty of the faculty of physic in

London, or by either of the two Universities of Oxford or Cambridge; therefore if any person using the mystery of an apothecary, shall refuse to compound or administer, or deliberately or negligently, falsely or unfaithfully, mix, compound, or administer any medicine ordered by any lawful physician, by any prescription signed with his initials, such person on complaint made, within twenty-one days, by such physician, and upon conviction of such offence before any of His Majesty's Justices of the Peace, (!!!) unless such offender can show some satisfactory reason, excuse, or justification in his behalf, forfeit for the first offence five pounds, for the second offence ten pounds, and for the third he shall forfeit his certificate and be rendered incapable in future of using the art and mystery of an apothecary, and shall be deemed incapable of receiving any fresh certificate, until he shall faithfully promise and undertake,

and some objections have been taken to the course, duration, and order of the studies which they require previous to examination, we are of opinion on the whole, that this company has executed the trusts reposed in it with a sound discretion. It cannot, however, escape calumny; for there is a general hostility in the medical body to all control: from the chemist's boy, who sells oxalic acid for Epsom salts, to the empyric who scours the town in his chariot, all, or nearly all, maintain the right of independence both in the privilege, extent, and mode of their practice. Advocates, as we are, for the principles of free trade in other matters, we cannot yet extend them to medicine. If Mr. Congo sells bad tea, if Mr. Brassy makes bad kettles, the buyers of tea and tea-kettles must look to their bargains; and Congo and Brassy will lose their customers; but if a chemist sells noxious or spoilt drugs for a wholesome or active medicine, death may be the consequence of his first blunder, or his first fraud. Even in great cities, the risk sustained by the community in this respect is considerable, but in remote parts of the country, in small villages, where there is no choice, no competition, it becomes excessive. The sick man cannot often say—"Bolus is a fool, Bolus sells bad drugs, I will go to Manchester next Monday and consult Dr. Wilson, or buy my pills at Watson's;" he must take Bolus's advice, and swallow Bolus's drench, or run the risk, the lesser of the two perhaps, that the progress of his disease may stop his journey to Manchester. In the frauds, the impositions, the ignorance, or unskilfulness of other trades, pro-

and give good and sufficient security, that he will not in future be guilty of the like offence."

Upon this absurdity of making a justice of the peace a judge of the goodness of calomel, or *pulv. rad. jal.* or any other drug, the authors of Medical Jurisprudence justly remark that, "The latitude of the conclusion as to renewal of certificates in some degree cures and compensates the otherwise extreme severity of this clause, yet the jurisdiction might have been better given than to *any* justice of the peace: how such magistrate, ignorant of medicine or chemistry, is to judge of the improper mixing or compounding of medicine, we do not pretend to anticipate, still less how he is to determine what is to be taken as a satisfactory reason, excuse, or justification.

The most probable offence to be committed in the country against this clause will be by substitution of cheap for expensive drugs; this is a very ordinary mal-practice, which ought to be checked; but if the apothecary have not the expensive drug by some excusable accident, and then substitute another of equal efficacy, he would be held excusable in a case of emergency by any medical authority competent to judge of the merits of the case: this an ordinary justice of the peace evidently cannot be."

The short answer is, that the justice is quite as well qualified to administer physic as law. He is competent by Act of Parliament; and, provided he be *unpaid* and not *malicious*, the public have no right to complain of his blunders.

fessions, and crafts little beyond the purse is affected ; but from medical mal-practices, life and limb are continually in jeopardy. We think, therefore, that the legislature has done well in imposing government on all branches of the faculty, and would rather see this government strengthened than relaxed ; but then special care must be taken that the governing body exercises its functions justly ; that in their original examination "they admit all that are fit and reject all that are unfit ;" that in the distribution of their honours, they are influenced not by Court favour, but by superiority of merit ; that they do not so much ask, where have you studied? though this may be a material question, as what have you studied? that they do not rely upon the name, but upon the competence of the teacher ; that, as corporations, they do not engross to themselves, or to a small portion of themselves, an exclusive enjoyment of official dignities, honours, or emoluments ; that they expend their revenue for public purposes only ; and that the accounts of their expenditure be open to the whole body, that all may know that their money is honestly disposed of ; that they avoid perpetual presidencies, permanent or self-elected committees or councils, and have no *house-lists* to fetter the elections of the commonalty ; that publicity be rather courted than avoided in all their proceedings. With these and similar rules of action, the medical colleges and company may become most beneficially useful to society ; without them, or, as has been too frequent, acting in opposition to them, they must expect bickerings, intrigues, and jealousies within, contempt and defiance from without.

The impending contests, which, for the public good, we hope to see ripened into open hostilities, will probably do much towards removing those besetting evils to which we have thus slightly alluded ; to their wholesome influence we shall leave the remedy, in full assurance also, that if they should fail, another yet more powerful is at hand, and will very shortly be brought into operation. The London University will, in all probability, relieve England from the imputation of having no Medical School ; the question then will arise, not between the purchased diploma of Aberdeen and the idly earned degree of Oxford, but between the scientific pursuits and philosophic inquiries of St. Pancras and the ostentation of Pall Mall East ; in such a contest, both parties under the eye of the public, whose patronage is the true and very substantial reward of victory, we cannot doubt which party would succeed. In order to avoid this unequal contest, to escape the degradation of this impending defeat, the Royal College must reform themselves betimes, they must cast aside their pomp, pride, and prejudice, forget their personalities, forego their exclusiveness, and, sinking individual interests, betake themselves at once to the

real objects of the institution, the safety of the public health—to them at least

Salus populi suprema lex.

should be a chosen motto and an undeviating rule of action.

Admitting then, for the sake of argument, that we may hereafter have medical bodies to whom the trust may safely be confided, let us inquire whether the Medical Police of the country (if it can be said to have any) might not admit of considerable improvement.

With the exception of the quarantine laws, and that these require considerable modification we admit, England has no regular system for the preservation of the public health; every thing is left to individual precaution and to our increasing habits of ventilation and cleanliness; but these alone are not always sufficient: the seeds of disease lie in so small a compass, and are conveyed in such subtle shapes, that persons unacquainted with the varied forms of contagion cannot easily guard against its generation or diffusion: thus it frequently happens that contagious disease has risen to considerable height, before any public precaution is taken for its prevention. This had been so frequently and severely felt in Ireland, that at length an act (59 Geo. 3, c. 41,) was passed, directing that officers of health should be elected annually by the inhabitants of cities, large towns, and other places, who are to act gratuitously, (?) but their expence to be paid by a rate; they are to cause all streets and lanes, courts, yards, and houses let to room-keepers, to be cleansed and purified, and all nuisances prejudicial to health to be removed therefrom; and all public sewers to be cleansed, and, when necessary, to be covered over, and all lodgments of standing water to be filled up or drained off; and also to cause and direct all other matters and things to be done for the ventilation, fumigation, and cleansing of any house whatever, in which fever, or other contagious distemper, shall have occurred, and for the washing and purifying the persons and clothes of the inhabitants of every such house, as shall appear to any such officer of health to be indispensibly necessary for the preservation and security of such parish against the danger of contagion. No inconsiderable number of districts, even in London, could be pointed out, where the active interference of such officers would be highly useful: the air of Covent-Garden, for instance, is poisoned by the nuisance of decayed vegetables; but though the stench must reach the noses of the magistrates at Bow-street, this disgraceful nuisance has been allowed to continue for years unabated. In other portions of the town, closely inhabited by the lower orders, malignant fevers are well known to exist every year to an alarming extent: there are many instances in which these disorders can be traced to a cause of easy remedy, as the draining

of stagnant pools ; yet as there is no public officer charged with this duty, the evil is allowed to continue from year to year, though numberless lives are sacrificed by the neglect. It has been proposed that a surgeon should be attached to each police office ; we think the suggestion well deserving consideration, not only as such an officer might attend, under due direction, to the removal of nuisances prejudicial to the public health, but also, as his examinations and evidence on many occasions might be relied upon, where the medical testimony produced by parties may fairly be doubted.

The burial of the dead, the slaughtering of cattle, and the existence of noxious and noisome trades, in the very heart of our towns and cities, are other points in which we are far behind our neighbours, being as much too lax as they are too rigid in medical police. Evelyn in his *Sylva* recommends the establishment of a *Necropolis* without the walls ; and a projector of the present day has propounded a plan for raising a pyramid for the reception of the dead in the neighbourhood of Primrose Hill : being too late for the joint stock mania his design has fallen to the ground. There is reason, however, to believe that necessity will shortly effect on this head what good taste should long since have insisted on ; the burial grounds within the city have become so crowded, that the sextons are in most places obliged to use a borer in order to ascertain whether the previously deposited coffins are sufficiently decomposed to allow of the earth being again opened. In 1814 a report was made to Parliament that the churchyard of St. Margaret's, Westminster, could not be used much longer as a burial ground, " for that it was with the greatest difficulty a vacant place could at any time be found for strangers ; that the family graves generally would not admit of more than one interment, and that many of them were then too full for the reception of any member of the family to which they belonged." Similar causes have already compelled many parishes to purchase burial grounds out of London, and as it is not found that the removal of bodies to these distances is attended with any material inconvenience, we may hope yet to see the day when future burials within the limits of any great city will be strictly prohibited, and that not only as to interments in churchyards, but as to the far more flagrant abuse of deposit in churches—a disgusting remnant of the worst part of Popish superstition. " Among the primitive Christians, burying in cities and churches was not allowed for several centuries ; and Theodosius, after the triumph and establishment of Christianity, renewed the prohibition upon the old and reasonable ground that graves within the city were detrimental to the health of the living ; and it was ordered that any person who should disobey this law was to forfeit the third part of his patrimony, and that the under-

taker who directed a funeral contrary to the prohibition was to be fined forty pounds in gold. The learned Bingham, in his *Antiquities of the Church*, has traced the gradual introduction of the odious custom of burying in churches. It was from the idea of the protection which would be afforded by consecrated ground, baptized bells and relics, that bodies were first interred in the vicinity of the church: to this superstition we may ascribe the origin of churchyards, which took place in the eighth century. The reason alleged by Gregory the Great, for burying in churches, or in places adjoining to them, was, that their relations and friends, remembering those whose sepulchres they beheld, might thereby be led to offer up prayers for them; and this reason was afterwards transferred into the body of the canon law. The practice thus introduced into the Romish church by Gregory was brought over here by Cuthbert, archbishop of Canterbury, about the year 750; and the practice of erecting vaults in chancels and under the altars, was begun by Lanfranc, archbishop of Canterbury, when he had rebuilt the cathedral, about 1075. Since this period many enactments have been made in different countries to abolish so foul a custom. (*Med. Jurisp.* v. i. p. 92.) And in many Roman Catholic countries the practice has either been totally prohibited or greatly restrained; but in this Protestant realm, this and some other superstitious customs, are found too profitable to be abandoned even by a reformed priesthood.

The butchers, no doubt, will be equally tenacious of their filthy and unwholesome practice of slaughtering in towns; the dangerous and inconvenient mode of driving the living animal through the streets being some fraction of a farthing in the pound cheaper than carriage for carcases, though, on the other hand, it may be contended, that the superior quality and quantity of the flesh of an animal unfevered and unreduced by a long journey, would more than compensate this difference. The whole state of our markets is disgraceful: priding ourselves on our habitual cleanliness, we might look with shame at the similar establishments of almost every city of the Continent; at Paris especially the markets are kept in admirable order by responsible officers; in London, if there be a clerk of the market, or other functionary charged with this duty, his only care appears to be the accumulation of fees and the exaction of *douceurs* for connivance. (a) On the Continent, slaughtering within the walls is almost universally prohibited. (b)

(a) The superintendent of Billingsgate has recently distinguished himself from his brothers in office by his active exertions to prevent the sale of unwholesome fish.

(b) It would appear that some of our own cities have adopted this wise regulation. "A fine for every beast slaughtered within the walls of Exeter, was held good under a bye-law.

Of other nuisances affecting the public health we have no mean variety, some indictable, some actionable; but actions and indictments are equally left to individual prosecution,—unless the next neighbour complains, it matters little how much the passenger may be offended. Thus we have soap-boilers and tallow-melters in the very heart of the town; but these, by-the-bye, the law says are not nuisances; and the authors last quoted, who seem to have an affection for black-letter grim-gribber (we hope with a view of exposing its absurdities), quote the following exquisite passage from Rolle:—"Si homme fait *Candells* deins un vill, per que il cause un noysome sent al inhabitants, uncore ceo nest ascun nusana, car le *needfulness* de eux dispensera ove le noisomness dell *smell*."

Thus also ancient breweries, vomiting enormous columns of smoke, are by prescription considered as not being nuisances, though the lungs and property of the people prove the contrary; and the quantity of coal consumed when they were established may not have been a hundredth part of their existing consumption. Against the increase of steam engines the legislature has provided an ineffective remedy in Stat. 1 and 2 Geo. 4. c. 41, by which it is enacted that the Court by which judgment ought to be pronounced in case of conviction or indictment may award costs to the prosecutor; and that if it should appear to such Court that the grievance may be remedied by altering the construction of the furnace, it shall be lawful for the Court, without the consent of the prosecutor, to make such order touching the premises as it shall think expedient for preventing the nuisance in future, before passing final sentence on the defendant.

As early as 1661, Evelyn published his *Fumifugium*, in which, among other things, he recites, that during the scarcity of coals, (c) occasioned by the siege of Newcastle, in 1644, infinite quantities of fruit, as they never produced the like before or since, were grown in my Lord Bridgewater's garden, in Barbican, and in the Marquis of Hertford's, in the Strand. Lord Eldon, in giving judgment on a case of nuisance by building, related that he had grown peaches in his garden in Gower-street, the *rus in urbe* of 1800.

This leads us to another point of medical police which we fear will never be duly considered by our legislature, though the

Cowp. R. 269. While this article was in the press, a meeting has been held for the consideration of this subject, and we may therefore expect some benefit from its public discussion.

(c) It was used as an argument

against the repeal of the duty on coals imported into the port of London, that if we were permitted to have that necessary commodity at any thing like a moderate price, London would become as fuliginous as Birmingham.

Parliaments of Cromwell thought it well worthy their wisdom to enact an ordinance against the increase of building in and about the capital, by which fines and penalties are to be levied on all new houses erected in the suburbs (Clare Market, Lincoln's-Inn-Fields, Covent Garden, and Shoe Lane excepted) which have not four acres of land continually used with them; a provident enactment, which it would have been well if the royal successor of the Usurper had enforced. The Parliament of Charles the Second did, indeed, provide for the free expansion of the great lungs of London, the river, by providing that no buildings should be erected within a certain distance of its banks; an act most improvidently, and, we make no doubt, most improperly repealed in the present reign. Should quays ever be erected on the river, the owners of the usurped property, thus gratuitously bestowed upon them, will claim from the country heavy compensations.

We dwell the more upon this branch of the subject from our conviction that it is one which deserves the most serious consideration: to preserve for the inhabitants of this enormous metropolis all the advantages of ventilation, cleanliness, drainage, and water, ought to be a paramount object of legislative provision. Nature has done much for us, the nature of the soil, the inequalities of its surface, the abundance of excellent springs, greatly facilitate the attainment of all these requisites for health; that which we principally want is a constant, diligent, and directly responsible superintendence to prevent the obstruction or abuse of these advantages. A once highly-favoured individual obtained for himself the inspection of all the gasometers, for fear we should be blown up; we wish that some equally patronised speculator would save us from being suffocated. (*d*)

From the general consideration of public health, we shall pass to that disease of individuals which renders them peculiarly subjects for legislative protection. In the wide range of medico-legal study there is not a subject on which the united services of lawyers and physicians is so frequently required as in the investigation of cases of alleged insanity; nor is there a point of medical police more worthy the serious attention of the legislature than the proper custody of idiots and lunatics. Unfortunately also, these are subjects on which the increasing frequency of madness in all its forms renders it necessary that the law should

(*d*) According to the population returns of Great Britain in 1811, the mortality in the county of Middlesex (in which London is situated) was 1 in 36, while the county of Cardigan was the healthiest, the pro-

portion being one in 73. The mean of all the counties of England was 49, and that of all the counties of Wales was 60.—*Beck. Med. Jurisp. auct. Young. Med. Lit.*

be reduced into a more systematic arrangement than it has at present received: we do not ask a mere consolidation of the statutes, but a consolidation of jurisdiction.

The King, it is said, has the guardianship of idiots and lunatics, and by a special warrant delegates his authority to the Lord Chancellor for the time being: this practice, no doubt, arose at a time when the judicial employments of that high functionary were not as extensive as they now are; the first question, therefore, which presents itself is, whether in future it would not be expedient to grant this special warrant to some other high legal authority less over-burthened with business; and then we might have an opportunity of considering whether the whole duty of superintending the care of the unhappy persons subjected to the jurisdiction might not be committed to the same officer; there might then be one law for rich and poor; but while a Commission out of Chancery remains the mode of deciding on mental competence, the poor are of necessity deprived of protection and redress. Nor is it, indeed, the absolute poor only who have to complain of the expensive process of this jurisdiction; few moderate fortunes would bear the cost and waste of a Commission of Lunacy. In 1799 the lowest estimate of a commission was 120*l.*, and we well know that law has not become cheaper since that period; but the cost of the commission is the least burthensome expense, the consequential charges are yet more heavy. In order to elucidate this point we cannot do better than transcribe the paper delivered to the Chancery Commissioners by Mr. Forster, a gentleman whose long and extensive experience entitles his opinions to considerable weight.

“Amongst the many complaints, which have been raised against the delay and expense of proceedings in the Court of Chancery, there is no branch of its practice where these evils are more glaring and burthensome than in the jurisdiction of the Court in matters of lunacy. For the protection of the persons and property of those unfortunate beings, who are incompetent to the care and management of themselves and their estates, the King, in right of his prerogative, has generally delegated to the Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, by warrant under his sign manual, countersigned by the two Secretaries of State, the custody of idiots and lunatics, and the power of administering their property. This power, being specially vested in the Lord Chancellor, cannot be exercised by the Master of the Rolls, or the Vice-Chancellor, who, of consequence, can entertain no applications in matters of lunacy. Hence the delay which frequently occurs in proceedings falling under this jurisdiction; for, whilst applications in causes, for bankruptcy, or under special acts of parliament, may be made indifferently to the Lord Chancellor, or the Vice-Chancellor, and, in the first and third cases, to the Master of the Rolls also, all subjects of lunacy must come under the purview of the former alone.

“This delegated jurisdiction of the Lord Chancellor, in matters of lunacy, is much more comprehensive, and embraces a much larger proportion of

the practice of the Court, than may, perhaps, be generally known to the public. The office of the secretary of lunatics affords a melancholy proof that insanity is a daily increasing malady in this country; and scarcely a family can be found whose members and connections are entirely free from this lamentable imperfection of human intellect. Whilst suits pending in the Court of Chancery are confined to some specific and definite objects, the verdict of a jury upon a commission of lunacy at once places under the administration of the Great Seal the whole of the affairs of the incompetent person, not unfrequently embracing almost every subject cognizable in a court of equity, and rendering indispensable the institution and prosecution of numerous suits and other proceedings, which, if insanity had not intervened, would have been unnecessary. All proceedings in matters of lunacy are moreover clogged with difficulties, formal proceedings, and technicalities, peculiar to this branch of the practice of the Court; for the powers of the committee of a lunatic's estate are of themselves most narrow and limited, no discretion in the management of the property committed to his care is vested in him: but the power to do, as well as the indemnity for doing, every specific and individual act must be obtained from the Court. And the mode, in which this power and indemnity are to be obtained, is not less objectionable than the necessity of obtaining them: whenever it is necessary to do any act for the improvement of the lunatic's estate, to grant leases, repair buildings, enfranchise copyholds, adjust accounts or claims, or take any proceedings whatever relating to the estate or concerns of the lunatic, a petition must, in every case, be presented to the Lord Chancellor, who refers the matter to the consideration of the Master, who reports his opinion, which opinion must be confirmed by the Court upon another petition, before the act or proceeding in question can be done or taken. For the passing of every annual account by the Committee before the Master, he must in like manner obtain an order upon petition, and he cannot even pay any balance which may be in his hands into Court, without a similar order made also upon petition. The only mode in which any application whatever in matters of lunacy can be made to the Lord Chancellor is by petition, setting forth the circumstances and grounds on which it is made, supported generally by affidavits verifying the facts; and, upon every order, referring particular subjects to the consideration of the Master, evidence must again be gone into and produced in his office. The power of the Master is strictly limited to the letter of the order of reference, and he can take into his consideration no subject relating to the lunatic, however trivial, without express directions from the Court. The delay and expense occasioned by these proceedings may readily be imagined to be enormous; but the expense is still further increased in every case in which the order of the Court is to be acted upon by the Accountant General. This occurs whenever the Committee has to pay into Court his annual balance, and whenever a sum of money is to be paid into or received out of Court; and also when stocks are to be transferred into or from the name of the Accountant General, or are to be sold or purchased by him. All orders in matters of lunacy are drawn up by the Lord Chancellor's secretary of lunatics; but all orders to be acted upon by the Accountant General must be drawn up a second time by the registrar, and also entered by him. Thus the expense of every order of this nature is more than doubled."

This well elucidates an apparent principle of the legislature:—"let nothing be done in one office which can by any possibility be divided among five." Even the Chancellor has not the whole

guardianship of lunatics, the important duty of visitingⁱ lunatic asylums and private madhouses is confided to Commissioners appointed by the College of Physicians. That medical officers are best calculated to perform this duty we will not deny; but that there should be some superior power to watch the execution of the duty is, we think, undeniable. There have been exposures of late, as to the manner in which pauper lunatics have been treated in the County of Middlesex which would determine this question, even if it were doubtful: without, therefore, any wish to add to the number of assailants of the College of Physicians, we must be permitted to doubt whether the abuses and enormities exposed in the late and some previous inquiries could have existed if the Commissioners had done their duty. It was once proposed that a single visiting officer should be appointed, and a Bill actually passed the Commons for that purpose; the authors of *Medical Jurisprudence* characterise this proceeding as a job,—no doubt it was one,—and give at least specious reasons for confiding the duty to a succession of Commissioners. They say, “Our principal objection, however, is to the permanence of the appointment; under the present system much benefit arises from the occasional change of visitors, by which means the unfortunate patients are brought under the view of a greater number of medical observers than could be otherwise obtained for them. A permanent officer may (*will*) soon be reconciled to abuses and become callous to suffering; while under the visitation of a temporary committee, the subject is kept fresh and vivid with all the interest of novelty, at least in the minds of the members last elected. The period for which each member serves on the committee (three years), and the extent of the pecuniary emolument, hold out no inducement to jobbing or canvas, even if the learned and honourable body would allow it, and a consequent security is afforded, that none will be elected from undue motives; there is always a risk of a contrary result when a well paid and permanent office is made the object of patronage; an improper person is frequently selected, and when those who have been originally well appointed become incapable by age, infirmity, or other incapacity, there is always a delicacy and difficulty in their removal.” The authors then propose that the legal Commissioners, named by the Lord Chancellor, should be joined in this duty of inspection with the medical Commissioners, elected by the College: “the former might acquire experience in judging of the ever-varying forms of lunacy, and the latter would gain legal assistance in the execution of their duty.” This suggestion, as far as it goes, might deserve consideration, admitting, for the sake of argument, that the Chancellor’s Commissioners are men of competent ability: possibly they are so; but the proceedings in Lord Portsmouth’s

case, when two special Commissioners, Hullock and Trower, (e) were added to the list, implied the contrary. Either the ordinary Commissioners were deemed inefficient for the determination of an intricate and important question; or else an undue regard was shown to an individual case.

That which is wanting in the whole jurisdiction of lunatics is a connected chain of responsibility and subordination; this great object cannot be attained while the several functions are distributed in numerous offices; they should be united in one; and, in order that that one should be effective, it should be separated as widely as possible from the over-burthened Court of Chancery.

The subject of ages, especially as respecting puberty, is amply treated of in the third and fourth of the works before us; and, in the former, questions of marriage, divorce, impotence, and sterility, occupy a considerable, yet we scarcely can say, undue space; pregnancy, gestation, delivery, tenancy by the courtesy of England, supposititious children and legitimacy then follow, and constitute a most important branch of lego-medical inquiry. Few, who have not looked carefully on this subject, can form any idea of the numerous sub-divisions into which these subjects ramify, nor of the number of questions and principles on which the Jurist must resort for illustration to the science of the Physician. The celebrated Douglass cause, the Annealey and Banbury Peerages, and the more recent cases of Sergison and Sergison and the Gardiner Peerage, may satisfy most readers of the necessity, unfortunately also, of the uncertainty of medical testimony: we may fairly hope, that the increasing study of medical jurisprudence will enable the faculty to free themselves from the opprobrium which has hitherto attached to them; and towards this object, the work of Dr. Gordon Smith, on Medical Evidence, though not as perfect as it may hereafter be rendered, may be a useful assistant.

The shortest possible period of gestation cannot often be a question raised in an English Court: "*Pater est,*" say our Jurists, "*quem nuptiæ demonstrant,*" and if a child be born within an hour of the ceremony, there is a *foregone* conclusion that the husband is the father. The joint authors controvert this position:—

"If a man marries a woman who is pregnant, he is generally to be supposed cognisant of the fact, and that he is the father of the child; and the

(e) Now Baron Hullock and Master Trower: it would be well if the appointment as Commissioners were more frequently considered as the stepping stone to higher preferment. The contrary has generally been the case: a man is usually made a Commissioner either before he has got business, or after he despairs of getting any.

law, which regards the time of birth and not of conception, (though it uses the term *primo-genitus* not *primo-natus*) pronounces it legitimate. But the husband may have been imposed upon, and utterly ignorant of his wife's state. (f) A man returning from abroad (to put the case of non-access more strongly) marries immediately on his arrival: within four or five months his wife is delivered of a perfect child which lives: shall such child inherit? On the one hand, *presumitur pro patre quem nuptiæ demonstrant*; on the other, the ordinary course of nature prohibits the supposition that the child can be the offspring of the husband. But see Rolle Ab. Tit. Bastard p. 358, where the woman was *grossément enscint* the issue was held an *mulier*, and contrary decisions cited there: see also Foxcroft's case. Rolle, Abr. 369, et sec. 45. So also a man may purposely marry a pregnant woman to disappoint his supposed heir at law; on the other hand a woman may for some purpose of malignity bastardize her offspring, as was the case of Savage the poet. (g) Par. and Fonb. Med. Jurisp. 217.

So also in case of non-access for a certain time, and that — months after the return of the husband a child was born, it would be a question whether the time of gestation could have been completed; though it has been held "that if the husband was in England during any part of the time between the conception and the birth (without any reference to the physiological impossibility of the fact) the child would be deemed legitimate (Rex v. Alberton, 1 Raym. 395.), 1 Par. and Fonb. 217. In the case of the Marechal de Richelieu, the Parliament of Paris decreed that the infant at five months possessed that capability of living to the ordinary period of human existence (*viabilité*) which the law of France required for establishing its title of inheritance. ib. 244.

The more ordinary discussion, however, arises on the possible prolongation of this period. The medical authorities allow nine calendar months or forty weeks to be the usual term, the law is said to give eleven days more; but as to this see the elaborate note of the late Mr. Hargrave to Coke Litt. republished in his Jurisconsult Exercitations. Numerous instances are, however, cited by our authors of much longer periods. "Thomas Bertholin relates of a

(f) In Cuthbert and Brown, Dublin, C. P. 1821, an action was brought against the defendant for deceit, by inducing the plaintiff to marry a woman who was at that time pregnant. P. & F. n.

(g) In 1697, the Countess of Macclesfield declared the child with which she was then pregnant to have been begotten by the Earl of Rivers; in consequence of which confession, without any previous proceeding in the Ecclesiastical Court, an act of parliament was passed annulling the marriage and declaring the child with which she was *enscint* illegiti-

mate: 9 and 10 Will. 3. c. 11; private act, ib.—a most scandalous job! In our own time the life of a celebrated lawyer and politician was made miserable by the malignant declaration of his wife, that one, but with refined malice she refused to specify which, of *her* children was not *his*. It is somewhat extraordinary that the son on whom the father's suspicions fixed, bore so strong a resemblance to him, that he might have affiliated himself *ore tenus* in any court of good conscience in the world.

young girl at Leipsic, who, on accusing a person of having seduced her, was confined and strictly guarded." (*Quis custodiet ipsos custodes?*) "At the end of sixteen months she brought forth a child which lived two days." Beck, 198. Petit states "that many faculties of medicine, forty-seven celebrated authors, and twenty-three French physicians and surgeons agree in believing that delivery may be delayed to the eleventh and twelfth month; nay, that it is perfectly demonstrated that this frequently occurs." *ib.* "Duliquar, chirurgion major to the regiment of Asfeld, testified, that with three children which *his wife* had produced, the term in two had been thirteen and a half months, and in the third, eleven months; and that he had recognised the existence of each of the pregnancies at four months and a half, by the most infallible sign, the motion of the child." This testimony is entitled to considerable weight. "Lepecq de la Cloture also gave an opinion in favour of the widow; and quoted similar cases from his own observation. This author dwelt much upon the inertness which grief produces on the uterine organs, and conceived that the languor which sorrow causes may retard the progress of gestation." *ib.*

"The last case which I shall notice," says Dr. Beck, "is one that enlisted all the medical talent of France in its discussion. Charles ———, aged upwards of seventy-two years, married Renée, aged about thirty years, at the commencement of the year 1759. They were married nearly four years without having any issue. On the 7th of October, 1762, he was taken ill with fever and violent oppression, which remained until his death. The last symptom was so severe, that he was forced to sit in his bed, nor could he move without assistance. In addition to these, he was seized with a dry-gangrene of the leg on the 21st, and with this accumulation of disease, he gradually sunk, and died on the 17th of November, aged seventy-six years. Renée had not slept in the chamber during his illness; but about three and a half months after his death, she suggested that she was pregnant; and on the 3d of October, 1763, (within four days of a year since the illness of her husband, and ten months and seventeen days after his death) she was delivered of a healthy, well formed, and full-sized child. The opinion of Louis was asked on this case, and he declared that the offspring was illegitimate. Had he rested at this, even the advocates of protracted gestation might probably not have murmured, as the circumstances were rather too powerful for the interposition of this favourite doctrine. But he took occasion, in his consultation, to attack the opinion generally, and to deny the possibility of the occurrence of such cases. Among the arguments which he adduces are the following: that the laws of nature on this subject are immutable;—that the foetus, at a fixed period, has received all the nourishment of which it is susceptible from the

mother, and becomes as it were a foreign body; that married females (*h*) are very liable to error in their calculations;—that the decisions of tribunals in favour of protracted gestation cannot overturn a physical law;—and, finally, that the virtue of females, in these cases, is a very uncertain guide for legal decisions. “If we admit,” says he, “all the facts reported by ancient and modern authors, of delivery from eleven to twenty-three months, it will be very commodious for females; and, if so great a latitude is allowed for the production of posthumous heirs, the collateral ones may in all cases abandon their hopes, unless sterility be actually present.” *ib.* 200.

We cannot approve either the reasoning or the feeling of this *obiter dictum*, and cannot allow the vulgar sarcasm with which it concludes to pass without reprehension. The laws of nature on this subject cannot be said to be immutable; for as the period may avowedly be shortened between the seventh and ninth month, there can be no good reason for concluding, in the face of testimony to the contrary, that it may not sometimes be prolonged. We would much rather, therefore, believe that nature had committed one of her innumerable vagaries, than that a woman of previously established character would be guilty of incontinence: it is easier to us to believe that grief would prolong gestation, than that its first impulse would give way to a guilty passion. For these reasons, and because no impossibility has been physically demonstrated, while strong presumptions have been raised to the contrary, we coincide in opinion with those authorities which have decided for legitimacy in a fairly doubtful case, from the previous character of the woman—*presumitur pro legitimatione*.

“The Prætor L. Papirius declared a child born at thirteen months legitimate, on the grounds that there was no certain period for the completion of gestation. The Emperor Adrian, at a subsequent period, as we are informed by Aulus Gellius, declared an infant legitimate which was born eleven months after the death of its father, on account of the unsuspected and undoubted virtue of the widow. A similar case is mentioned by Godefroy, in his notes on the novels of Justinian. A widow was delivered fourteen months after the death of her husband, and her issue pronounced legitimate by the Parliament of Paris. It appeared that she had lived with the relatives of her husband, during the whole period of widowhood; that they had never observed any impropriety in her conduct, and they also testified to the deep and constant grief she had manifested for the loss of her partner.”—Beck, 198.

(*h*) Though it may at first sight appear paradoxical, yet there is some reason for preferring the testimony of unmarried females of tolerably good character on this point, since they can often calculate from a single coitus, which married women seldom

can do, but are obliged to reckon from the first stoppage of menstruation, (an uncertain rule at best) making an allowance of fourteen days, which must frequently be as much as twelve or thirteen days wrong.

Thus conception, gestation, parturition, and the filiation of children, may be amply elucidated by the science of the medico-jurist; his aid is almost equally important in numerous other questions arising in civil judicature, as in ascertaining the right of a father to be a tenant by the courtesy, in actions for injuries, *mala praxis*, adulterations of food, the validity of insurances on lives,⁽ⁱ⁾ and points of doubtful inheritance depending on the survivorship of persons destroyed by some common calamity.

Impositions, and feigned diseases, from the pregnancy of the fanatic Johanna Southcott to the shirking of a local militia man, from Mary Tofts, the mother of rabbits, to Anna Moore, the fasting woman of Tutbury, whether the deceit be practised as religious imposture, to excite compassion, or to avoid the execution of a duty, require the judgment of medical authority; nor must the witness or examiner think that he has an easy task before him: there is not one of the cases cited by our authors in which some learned doctor has not been imposed upon, and in most of them the medical partisans have generally been the most violent and the most positive. It is probable that the Mendicity Society could furnish many most curious instances of the ingenuity displayed by the beggars of London in simulating disease, and the annals of the military and naval hospitals are full of the history of *malingerers*,^(k) and reluctant recruits; to the former it appears that the *mistura diabolica*, compounded of all that is most bitter, nauseating, but innocuous in the pharmacopeia, administered in minute doses every half hour, is an unfailing remedy; but for the detection of the obstinate impostor, determined to avoid military service, more skill is necessary. Dr. Paris cites the case of a soldier in the African corps, who affected somnolency so well that neither the shower bath nor shocks of electricity disturbed his pretended slumber; but on a proposal to apply the actual cautery (red hot irons) his pulse rose. Dr. Beck mentions a curious instance of a conscript who declared himself deaf, and resisted all the devices of the surgeons to detect him; at the moment he was about to be discharged, a small coin was secretly dropped and clinked at his feet. A cannon had not roused him, but the *sacra fames* did—he turned round and looked for the money.

But criminal jurisdictions are those before which medical testimony is most frequently and most obviously required. In every form of murder and suspected murder, the *moriendi mille figuræ* are to be examined by the medical attendant: it would be well if we could say by the medico-jurist; but, from the neglect of this study by the mass of the profession, many and serious evils have

(i) Insurance from fire also is capable of illustration by the phenomenon of spontaneous combustion.
(k) See Harman's Military Inquiry.

ensued, and the strangest incongruities of testimony have arisen upon the plainest cases; it is impossible to read the evidence given on the trials of Donellan, Eliza Fenning, Donnell, and many others, without being struck either by the paucity of information or the laxity of moral feeling evinced by many witnesses; the law indeed is partly to blame; instead of insisting on the testimony of competent and responsible authorities, the Courts must be content with any witness, whether shop-boy, master, or apprentice, whom the parties choose to put into the box: these, in too many instances, act as partisans to support a case, not as auxiliaries to the purposes of justice. Before coroners (a class now held in very considerable and, we fear, deserved disrepute), this evil is of most frequent and dangerous occurrence, especially since the greater number of these functionaries have (as we believe in the teeth of the *dictum* of the King's Bench most illegally) shrouded the proceedings of their Courts in that obscurity which ignorance loves and malversation covets. Even while we are writing, a coroner, who has usually held his inquests in public, took the opportunity of excluding the reporters for the press from an inquest on the body of a gentleman of considerable wealth, who had died immediately *after* taking laudanum. We would not confound the *post hoc* with the *propter hoc*; but we must confess there was reasonable ground for suspicion in this case, and that suspicion would have been best repelled by publicity. The coroner, no doubt, would be highly offended, if on his next sitting at the Triumphant Chariot or Crooked Billet, he should be told that he makes one law for the rich and another for the poor: but let him ask his own conscience whether there may not be some ground for the imputation. Not being publicly assured of the contrary, the Insurance Office at which this gentleman may have had policies, may doubt whether he did not die by his own hand, (1) and whether the policies are not therefore void; shall it be said that they are bound by a coroner's inquest held in the dark? certainly not. The false delicacy of the family and the imprudent acquiescence of the coroner will then have occasioned a litigation which notoriety would have avoided.

(1) We may take occasion to except to this vague term, and to protest against the inhumanity of the practice of vitiating the policies of those who destroy themselves during well authenticated mental derangement, the most dreadful calamity to which human nature is subject. Every provident man will go to that office which will secure his family against the consequences of the

greatest number of risks, brain fevers included. We fear there is not one now which insures against this dreadful evil (The Amicable Society having lately altered its rule); but as some companies are more liberal than others, prudent fathers will seek that institution which allows the greatest latitude, even if they must pay some few shillings per annum for the increased risk.

The range of medico-legal inquiry, however, on the subject of criminal matters is so wide, and generally so well known, that we shall not extend this article by any analysis of the works before us on this branch; having repeated, that each has many merits, and each some defects; that one is better suited to the medical student, another to the lawyer or magistrate, we may conclude by earnestly commending, if not the works, their subject to the reader.

ART. IV.—CERTAINTY OF ENGLISH LAW.

The Life of Napoleon Buonaparte, Emperor of the French.

By the Author of Waverley. Edinburgh, 1827. (Vol. 6.)

THE title of the work prefixed to this paper may possibly startle our peaceably disposed readers; we hasten therefore to relieve their groundless alarms. With Napoleon, as a conqueror, a statesman, or an exile, "THE JURIST" can have little concern. But Napoleon, as a legislator—a creator, and not a destroyer—as the beneficent founder of an enlightened system of laws, which will long and long outlive all traces of the appalling political changes in the face of Europe, produced by his victories or his reverses—Napoleon, in this exalted character, will frequently invite our attention, our reverence, and our admiration. The code which bears his name is not without its faults. But whether we look to its matter or its arrangement, to its sense or language, to its positive enactments, or its plan of administrative organization, it presents so many subjects for unqualified applause, so many points of interesting speculation, that we shall have constant occasion to dwell upon the provisions of its various branches, and to recommend them to the notice of those among our countrymen, who think, or at least suspect, that our own legal system may peradventure admit of improvement.

It is not intended, however, in the present remarks, to discuss the merits of the French code, or to combat the many unfounded and erroneous statements, as to its history and operation, that have appeared in English writings, and the crude notions upon codification generally to which these mistatements have given birth. A more favourable opportunity for this purpose will hereafter present itself. Our immediate object is to examine, or rather to admire, certain opinions which the author of "The Life of Napoleon" has, in an unguarded moment of patriotic intoxication, ventured to proclaim to the world, as to the transcendent excellence of the English law in general, and the comparative degree of certainty belonging to the French and English systems in particular. The reader will smile at the expression "certainty of

English law ;" it seems a solecism in language, a contradiction in very terms. It is as if one were to talk of the immutability of the English climate, the liveliness of the English character, the discretion of youth, the wisdom of country justices, or the certainty of the lottery. But it is far from improbable that this identical circumstance, the enormity, namely, of the paradox, and the pleasing hope of astonishing, may have been the chief temptations with our author ; and that he has preferred the glory of attributing to the English law an unheard-of quality to the humbler task of descanting on such hackneyed and sleep-inducing topics, as the "*Palladium of our Liberties*,"—juries, grand and petty, publicity of trial, writ of *habeas corpus*, and so forth. Something like a confession indeed of such a craving for the fame of originality appears in the first passage which we shall quote. And now, reader, as the arch-critic Bentley says, when he makes awful preparation to transform *vulpecula* into *nitedula*, prick up your ears and be unremitting in your attention whilst this matter is sifted and probed to the quick. (a)

" But, while we admit the full merits of the civil code of France, we are under the necessity of observing that the very symmetry and theoretical consistency, which form at first view its principal beauty, render it, when examined closely, less fit for the actual purposes of jurisprudence than a system of national law, which, having never undergone the same operation of compression, and abridgment, and condensation, to which that of France was necessarily subjected, spreads through a multiplicity of volumes, embraces an immense collection of precedents, and, to the eye of inexperience, seems, in comparison of the compact size and regular form of the French code, a labyrinth to which no clue is afforded. It is of the greater importance to give this subject some consideration, because it has of late been fashionable to draw comparisons between the jurisprudence of England and that of France, and even to urge the necessity of new-modelling the former upon such a concise and systematic plan as the latter exhibits." pp. 54, 55.

There are persons who may possibly imagine that, although the existence of a large collection of decisions might be advantageous, provided they were never contradictory or inconsistent ; yet that little benefit could result from their being spread through a multiplicity of volumes, and that little prejudice could arise from compression, and abridgment, and condensation. But it has, it seems, been fashionable to recommend the conciseness and systematic plan of the French code to the imitation of the English ; and this is sufficient reason for the adoption of a contrary opinion. To proceed :—

" In arguing this point, we suppose it will be granted, that that code of institutions is the most perfect, which most effectually provides for every

(a) Arrige aures, lector, et intento fac sis animo, dum locum hunc excutimus, et ad vivum secamus.—*Not. ad Horatii Epist. i. 7.*

difficult case as it emerges, and therefore averts as far as possible the occurrence of doubt, and, of course, of litigation, by giving the most accurate and certain interpretation to the general rule, when applied to cases as they arise. Now, in this point, which comprehends the very essence and end of all jurisprudence,—the protection, namely, of the rights of the individual,—the English law is preferable to the French in an incalculable degree; because each principle of English law has been the subject of illustration for many ages, by the most learned and wise judges, acting upon pleadings conducted by the most acute and ingenious men of each successive age. This current of legal judgments has been flowing for centuries, deciding, as they occurred, every question of doubt which could arise upon the application of general principles to particular circumstances; and each individual case, so decided, fills up some point which was previously disputable; and, becoming a rule for similar questions, tends to that extent to diminish the debatable ground of doubt and argument with which the law must be surrounded, like an unknown territory when it is first partially discovered.” pp. 55, 56.

We shall not lay much stress upon the inappropriate use that is here made by our author, for the second time, of the term *jurisprudence* for *law*; having too much respect for that comfortable maxim of Locke, that “every man has so inviolable a liberty to make words stand for what ideas he pleases, that no one hath a power to make others have the same ideas in their minds that he has, when they use the same words that he does.” Proceeding, therefore, to the matter, we would ask, whether it might not almost be supposed, that the writer was discussing the case of the “unknown partially discovered territory” which he mentions?—that he was arguing, from some loose historical fragments, upon the degree of certainty offered by the laws of the ancient Incas of Peru, and supplying the absence of facts by induction and conjecture? or, like Cuvier and Buckland, speculating upon antediluvian worlds, and the judicial systems of nations coeval with the Mammoth. With respect to his postulate, we *do* grant most unhesitatingly that “that code of institutions is the most perfect” (in its machinery) “which most effectually provides for every difficult case as it emerges, and therefore averts as far as possible the occurrence of doubt, and, of course, of litigation;” but whether the English law does this, remains to be seen. We are equally ready to grant that, if nothing is wanting to legal perfection but a “current of judgments that has been flowing for centuries,” the law of England has enjoyed the full benefit of this judicial irrigation. We grant, moreover, that, if a countless multitude of decisions must of necessity illustrate and elucidate the principles of law, this light has been shed in ample measure upon the principles of *English* law. Our law indeed in this respect may be said to be “dark with excessive bright;” or, as the Italian poet expresses it,

Col suo lume se medesimo celsa.

But can it be, that the "Author of Waverley" has never heard of other judges than those who were "learned and wise?" that he has never read of pleaders who to their *acuteness* and *ingenuity* have added some small portion of cunning, and quirk, and chicanery? Does he imagine that, from time whereof the memory of man runneth not to the contrary, reason has presided in the English Courts of Justice, and preserved an undeviating rectitude and uniformity of opinion, and that passion and prejudice, folly, ignorance, rashness, and corrupt influence have never approached the judgment seat? Does he really believe that judges are occupied solely in determining new cases; and that the same point has never been twice tried, aye, and differently determined each time? Has he, finally, never heard of a conflict of legal doctrines, of a schism on the bench, of text writer marshalled against text writer, and judicial *dicta* opposed to judicial *dicta*, of law warring with law, and decision jostling decision?

"Faith, replied my friend," (says 'The Citizen of the World,') "I should not have gone to law, but that I was assured of success before I began; things were presented to me in so alluring a light, that I thought by hardly declaring myself a candidate for the prize I had nothing more to do than to enjoy the fruits of the victory. Thus have I been upon the eve of an imaginary triumph every term these ten years." "But, prithee, what reasons have you to think an affair at last concluded which has given so many former disappointments?" "My lawyer tells me that I have Salkeld and Ventris strong in my favour, and that there are no less than fifteen cases in point. Salkeld and Ventris are lawyers, who some hundred years ago gave their opinions on cases similar to mine; these opinions which make for me my lawyer is to cite, and those opinions which look another way are cited by the lawyer employed by my antagonist; as I observed, I have Salkeld and Ventris for me, he has Coke and Hale for him, and he that has most opinions is most likely to carry his cause."

Such was the idea of the expedition and certainty of the law entertained by the incomparable Goldsmith. How different our author's is will appear by the following passage.

"The certainty of the English jurisprudence, (for in spite of the ordinary opinion to the contrary, it has acquired a comparative degree of certainty,) rests upon the multitude of its decisions. The views, which a man is disposed to entertain of his own rights, under the general provisions of the law, are usually controlled by some previous decision on the case; and a reference to precedents, furnished by a person of skill, saves, in most instances, the expence and trouble of a law-suit, which is thus stifled in its very birth. If we are rightly informed, the number of actions at common law, tried in England yearly, does not exceed between five and twenty and thirty on an average, from each county; an incredibly small number, when the wealth of the kingdom is considered, as well as the various and complicated trans-

actions incident to the advanced and artificial state of society in which we live." p. 60.

Now, assuming for a moment that the author is correct in his statement of the amount of actions tried, it is to be observed that he studiously excludes from his consideration the number of records withdrawn, of private arrangements made on the eve of trial, *because of the uncertainty of the law*; the number of claims carried from law to equity, because the party is remediless at law; and, above all, the incalculable multitude of cases in which a man, warned by the charitable counsel of some conscientious practitioner, by his own fatal experiences, or the spectacle of his neighbour's wretchedness, sits down resignedly, and acquiesces in a wrong, content rather to sacrifice his just claims, or to pay a definite sum of money, than to expose himself to agony of mind, and ruin of means, by a system under which victory is often far more disastrous than defeat elsewhere. Suits may be "stifled in their birth;" but the certainty of the law is assuredly not the cause of their premature dissolution.

But, lest our author should say that this is mere assertion, and that the case supposed by the poet and novelist is pure imagination, let us hear the testimony of the adepts in the art, conformably to a maxim of that law, which our author so much venerates, that *cuiuslibet in arte sua credendum est*. Two hundred years ago, Lord Bacon, no mean authority, said:—"But certain it is, that our laws, as they now stand, are subject to *great uncertainties, and variety of opinion, delays, and evasions*; whereof ensueth, 1. That the multiplicity and length of suits is great. 2. That the *contentious person is armed, and the honest subject wearied and oppressed*. 3. *That the judge is more absolute*, who in doubtful cases hath a greater stroke and liberty. 4. That the Chancery Courts are more filled, the remedy of law being often obscure and doubtful. 5. That the ignorant lawyer shroudeh his ignorance of law, in that doubts are so frequent and many. 6. That men's assurances of their lands and estates by patents, deeds, wills, are often subject to question, and hollow and many the like inconveniencies."

Has then the "current of legal judgments flowing for (two) centuries" removed or diminished the evils complained of by Lord Bacon? Mr. Watkins shall witness for us. In his preface to the second volume of his *Treatise on Copyholds*, he thus expresses himself:—"The author has been brief; and, where the subject permitted him, he has endeavoured to extract consistency. This he found, however, was not always even to be hoped for. He found reporter against reporter, and case against case. He found consequences continuu, when their causes had ceased. He found conclusions, which justly followed from premises which

once existed, applied to instances in which those premises could not exist. He found arbitrary assertion adopted by servility, cherished by prejudice, and at length matured into doctrines, whose law could not be questioned, but whose absurdity was too apparent to be denied. It must not therefore be wondered at, if, when so situated, he has, in some instances, left the law in all its *glorious uncertainty*; and to such uncertainty must it always be subject, while we consider common sense as subservient to precedent, and suffer the blunders of one age to be the criteria of right in another." Let us next hear what Serjeant Peake says, upon the certainty of case-law, in a matter of evidence;—"The cases on this point are so contradictory, that *it is impossible to reconcile them.*" (b) Nay, even judges are to be found, who will not scruple to make the same avowal, so consolatory to suitors, who look to the laws for certainty. "I have arranged all the cases," says Lord Mansfield, "that have been determined in Westminster Hall, in order of time; and when I come to state them, you will be surprised to see they stand so little in the way, as *binding* authorities against justice, reason, and common sense. All they show is, the *great uncertainty of the meaning*, and the impossibility of putting an absolute sense to hold good in all cases; they are themselves *so many contradictions, backwards and forwards.*" After duly marshalling the conflicting cases, he adds:—"Thus stood all the authorities down to the year 1743; a period of two hundred years; not much to the honour of the learned in Westminster-Hall, *to embarrass a point, which a plain man of common sense and understanding would have no difficulty in construing.*" (c) Again:—"There is *so great contradiction in decisions,*" remarks Mr. Justice Ashhurst, "respecting the boundaries of evidence, that I rather choose to give my opinion on the particular circumstances of the case, than to lay down any general rule on the subject." (d) Yet again:—"It seems to me," says Lord Commissioner Eyre, (e) "that those two cases (*Acherley v. Vernon*, and *Attorney General v. Downing*) are in *direct opposition to each other.* The latter was determined by a very able judge (*Lord Camden*), and *having the former before him*, which increases the difficulty; but it seems to me, upon the best consideration, that the former case is so deter-

(b) Law of Evidence, p. 146.

(c) *Pugh v. D. of Leeds*. Cowp. Rep. 718, 722. It may edify our non-professional readers to learn, that the point so inexplicably perplexed by learning was the meaning of the particle "*from*," and that the grammar and law of Lord Mansfield's decision

have been combated by Mr. Powell, in his *Essay on Powers*, in a comment which occupies the moderate space of nearly one hundred pages.

(d) *Bent v. Baker*. 3 T. R. 34.

(e) *Barnes v. Crowe*. 1 Ves. jun. 405.

mined, and is of such authority, that every thing must yield to it." And some future Lord Commissioner will, no doubt, cherish and protect Attorney General v. Downing; and discover upon the best consideration, that it is so determined, and of such authority, as to be irresistible. Again:—"Though Lord Mansfield, in delivering his opinion in that case (*Raynard v. Chase*) pretends to distinguish it from, and to save the case of *Hobbs v. Young*, yet in truth those decisions are in direct opposition to each other in principle, and are so considered," (f) &c. Lord Ellenborough, once more, speaking of the cases upon the Annuity Act:—"We have not in this case to struggle with the Act of Parliament, but with decisions. They are so many, and so potent, that I feel it my duty to look into them in order to guide myself through the quicksands which they have opposed to the attainment of justice in this case. The Act of Parliament is very specific; and is meant for a clerk to execute, and not for an acute lawyer." (g) And, on another occasion, of the same decisions he says:—"So much ingenuity has been expended upon the construction of this act, that doubts have been raised where they could never otherwise have arisen." (h)

But it surely cannot be necessary to multiply authorities. How could it fall out otherwise? How is it possible that decisions should be uniform and consistent, when the very persons who pronounce them are not agreed as to the nature and sources of that common law, upon which the greater part of the decisions are professedly founded?—when one declares, that "principles of private justice, moral fitness, and public convenience, make common law, without a precedent;"—another that this "common law is drawn from natural and moral philosophy, from the civil and canon law, from logic, from the use, custom, and conversation among men, collected out of the general disposition, nature, and condition of human kind;"—a third, that "immemorial usage" alone constitutes it;—a fourth, that it is what is "agreeable to the principles of right and wrong, the fitness of things, convenience, and policy;" (i) a fifth, that "it is what is to be found in the opinions of lawyers, delivered as axioms, or to be collected from universal and immemorial usage;" (k) a sixth, that "common error is its source;" (l) and so on *ad infinitum*.

(f) By Lord Ellenborough in *Keen v. Downay*. 15 East. 168.

(g) *Lyecester v. Lockwood*. 1. M. & S. 433.

(h) *Ranger v. E. of Chesterfield*. 5. M. & S. 5.

(i) See *Millar v. Taylor*, 4 Burrow's Rep. 2303, for the above four

definitions of common law, by the four judges, Willes, Aston, Yates, and Lord Mansfield, sitting on the same bench.

(k) Lord Kenyon, in *Ball v. Herbert*. 3 T. R. 261. See also *Blundell v. Catterall*. 5 B. & Ald. 268.

(l) Holt, C. J. "The practice

We must return, however, to our author. Hitherto he has confined himself to general assertion; he now proceeds to a particular exemplification of his doctrines:—

“To make a practical application of what we have stated to the relative jurisprudence of France and England, it may be remarked, that the Title V. of the first Book of the Civil Code, upon the subject of marriage, contains only one hundred and sixty one propositions respecting the rights of parties, arising in different circumstances out of that contract, the most important known in civilized society. If we deduce from this gross amount the great number of rules which are not doctrinal, but have only reference to the forms of procedure, the result will be greatly diminished. The English law, on the other hand, besides its legislative enactments, is guarded, *as appears from Roper's Index, by no less than a thousand decided cases, or precedents, each of which affords ground to rule any other case in similar circumstances.* In this view, the certainty of the law of England, compared to that of France, *bears the proportion of ten to one.*” pp. 58, 59.

No one in his senses can doubt it. The proposition is as clear as daylight. Legs were designed for progressive motion, or running; now a pig has four legs, and a man has but two; *therefore*, a pig runs twice as fast as a man. Q. E. D.—and the line of the Satyrist—

As slowest insects have most legs—

is nonsense.

Whatever may be thought of the doctrine broached by the author, no one can deny him the merit of elaborating his proposition with singular zeal and industry. Lest there should be any whose minds are so unhappily organized as not to yield conviction to the above exact demonstration, he next tries the fascinating power of trope and figure. The reader, however, may perhaps be of opinion, that in the choice of his illustrations, his zeal sometimes outstrips his discretion.

“It is, *therefore*, a vulgar, though a natural and pleasing error, to prefer the simplicity of an ingenious and philosophic code of jurisprudence to a system, which has grown up with a nation, augmented with its wants, extended according to its civilization, and only become cumbrous and complicated, because the state of society to which it applies has itself given rise to a complication of relative situations, to all of which the law is under the necessity of adapting itself. In this point of view, the Code of France may be compared to a warehouse built with much attention to architectural uniformity, showy in the exterior, and pleasing from the simplicity of its plan, but too small to hold the quantity of goods necessary to supply the public demand; while the *common law of England resembles the vaults of some huge gothic building, dark indeed, and ill arranged, but containing an immense store of commodities, which those acquainted with its recesses seldom fail to be able to produce to such as have occasion for them.*” p. 59.

having been, in case of taxes, to train, *communis error facit jus.*”
grant a conditional warrant to dis- India Co. v. Skinner. Comberb. 342.

Aye, "dark indeed, and ill-arranged" beyond the power of order, "but containing," as our author justly observes, "store of commodities," of all sorts, and sizes, and shapes, and complexions,—cases black, and cases white, and cases neither black nor white,—cases old, and cases new,—cases in accordance with common sense, and cases superior to common sense,—cases *in banc*, *nisi prius* cases, and cases manufactured by reporters, (m) —printed cases, and manuscript cases,—*obiter dicta*, and extra judicial decisions, and points reported *arguendo*,—"which those acquainted with its recesses seldom fail to be able to produce to such as have occasion for them." All of which, though we most powerfully and potently believe, yet, as Hamlet says, we hold it not honesty to have it thus set down by the "Author of Waverley."

As to what immediately follows, we can afford the reader no sort of clue or explanation.

"The practises, or adjudged cases, in fact, form a breakwater, as it were, to protect the more formal bulwark of the statute law; and, although they cannot be regularly jointed or dove-tailed together, each independent decision fills its space on the mound, and offers a degree of resistance to innovation, and protection to the law, in proportion to its own weight and importance." pp. 59, 60.

Whether the adjudged cases do "in fact form a breakwater, as it were," is more than we can pretend to fathom. Lord Ellenborough, C.J., as we have above seen, terms them *quicksands*. However this may be, we most fervently recommend it to the Archbishops and Bishops, to make one slight addition to a verse in the Litany:—"From lightning and tempest, from plague, pestilence, and famine, from battle, and murder, and from sudden death, from metaphors and from similes, Good Lord deliver us."

The next argument of our author is addressed to the passions, *ad captandum*, and is in all respects a master-piece.

"But we regard the multitude of precedents in English law as eminently favourable, not only to the certainty of the law, but to the liberty of the subject; and especially as a check upon any judge, who might be disposed to innovate either upon the rights or liberties of the lieges. If a general theoretical maxim of law be presented to an unconscientious or partial judge, he may feel himself at liberty, by exerting his ingenuity, to warp the right

(m) "Lord Mansfield absolutely forbade the citing that book (Barnardiston's Reports in Chancery); for it would be only misleading students to put them upon reading it. He said, it was marvellous, however, to those who knew the Serjeant, and his manner of taking notes, that he should so often stumble upon what was right:

but yet that there was not one case in his book which was so throughout." 2. Burrow's Rep. 1142. note. -- Yet we have heard, that a late equity judge was rather disposed to countenance the learned Serjeant's labours; and the time may come, when their authority will be undisputed.

cause the wrong way. But if he is bound down by the decisions of his wise and learned predecessors, that judge would be venturous indeed, who should attempt to tread a different and more devious path than that which is marked by the venerable traces of their footsteps; especially as he well knows that the professional persons around him, who might be blinded by the glare of his ingenuity in merely theoretical argument, are perfectly capable of observing and condemning every departure from precedent. (The intelligent reader will easily be aware, that we mean not to say that every decision of their predecessors is necessarily binding on the judges of the day. Laws themselves become obsolete, and so do the decisions which have maintained and enforced them." Author's note.) "In such a case he becomes sensible, that, fettered as he is by previous decisions, the law is in his hands, to be administered indeed, but not to be altered or tampered with; and that if the evidence be read in the court, there are and must be many present, who know as well as himself, what must, according to precedent, be the verdict, or the decision. These are considerations which never can restrain or fetter a judge, who is only called upon to give his own explanation of the general principle briefly expressed in a short code, and susceptible, therefore, of a variety of interpretations, from which he may at pleasure select that which may be most favourable to his *unconscientious or partial purposes*." pp. 60, 61, 62.

The first thing which must strike every one, upon perusing the above passage, is the author's deviation from established practice, in his comparative estimate of present and past judicial character. He seems to think it within the range of possibility, that present judges may be *unconscientious and partial*, and may require some check; but takes it for granted that their predecessors were all *learned and wise*. Now we, on the other hand, make it a point of conscience to believe all present judges to be eminently learned and wise, of unerring discretion and incorruptible integrity, and hold any insinuation to the contrary to be downright heresy; but we happen to know, that very many of their predecessors, in the "venerable traces of whose footsteps" they are to tread, were foolish, and self-willed, and unconscientious, and partial, and basely servile.

To touch, however, upon the important point:—the degree of restraint, namely, imposed upon the judicial functionary by former decisions, and the consequent security afforded to the liberty of the subject. It appears, that "that judge would be venturous indeed, who should attempt to tread a different and more devious path, than that which is marked by the venerable traces of the footsteps of his predecessors." But then the "intelligent reader" is to understand, that all former decisions are not necessarily binding, because "laws themselves become obsolete, and so do the decisions which have maintained and enforced them." "Yes," an *intelligent reader* in Crim Tartary will say, "of course your legislature, always anxiously watchful over the integrity and due administration of the laws, declares when a law is to be considered obsolete, and a decision nugatory." Not so. The judge himself determines the question of their validity. "Fettered as he is by

previous decisions," he has nothing to do but to pronounce those previous decisions obsolete; he at once bursts his shackles, and recovers his wonted judicial freedom. "We don't now sit here," exclaims Lord Mansfield, "to take our rules of evidence from *Siderfin* and *Keble*;"⁽ⁿ⁾ and away go *Siderfin* and *Keble* at one fell swoop.

Far be it from us to affirm, that the judges have invariably disregarded the decisions of their predecessors. Many and splendid are the instances on record of their blind devotion to the idol Authority; but the intelligent reader may be disposed to doubt whether adherence to precedent has been more favourable to the "rights and liberties of the lieges," than arbitrary and capricious deviation. In the famous *Habeas Corpus* case in 1627, the decision of the Court of King's Bench,—that no person committed by the King or Council could be enlarged on bail,—was professedly founded upon precedents, in direct opposition to *Magna Charta* and six other statutes.^(o) "As to the Acts of Parliament," says Selden,^(p) "the judges gave no answer, *but only commended them*;" and in another place he remarks;—"all precedents were read, Acts of Parliament indeed were passed over." It is amusing to find the Chief Justice (Hyde) delivering judgment almost in the words of the "Author of *Waverley*:"—"What can we do," says he, "but *walk in the steps of our forefathers*?"^(q) As another edifying instance of the power of precedent, we may mention the case well known by the name of the *Bewdley case*,^(r) in which the express directions of a most explicit statute (4 and 5 Anne. c. 16,) were set at nought, upon the grounds, as Chief Justice Parker stated them, that "the constant practice, ever since the making of the act" (that is, *for seven years*) "and all the precedents, were otherwise." Who, after this, will dare to dispute the doctrine laid down by Lord Mansfield, when Solicitor General, that "common law" (the offspring of common error, as Lord Holt describes it,) "is superior to an Act of Parliament?"^(s)

When the positive enactments of the legislature were thus unceremoniously treated, in deference to precedents, it could

(n) *Lowe v. Jolliffe*. 1 W. Blackstone, 366.

(o) See *State Trials*. 3 Charles 1. 1 Rushworth. 461.

(p) Selden's works, vol. 3, part 2, pp. 1955-6.

(q) *State Trials*.

(r) 1 Peere Wms. 207.

(s) 1 Atkyns. 33. The reason as-

signed for the superiority may possibly afford as much merriment to the reader as it has to Mr. Bentham,—because "It works itself pure from the fountains of justice." See Mr. Bentham's comment upon this speech, and upon jurisprudential law generally, in his *Rationale of Evidence*, vol. iv. book 8, c. 24.

scarcely be expected that common sense and mere justice would meet with greater forbearance. "This rule being now established," says Lord Mansfield, speaking of a preposterous rule as to the constructive revocation of a will, (t) "*must* be adhered to, although it is not founded upon truly rational grounds and principles, nor upon the intent, but upon legal niceties and subtilty." Again, the same Chief Justice:—"The absurdity of Lord Lincoln's case is *shocking*. However, it is now law; (u) "I admit," says Mr. Justice Yates, "that the original reason of the rule in Shelley's case has long since ceased; but I deny that for that reason it must be discountenanced, it having long been the law of the land; and this, though the reason has ceased, to preserve *that noble uniformity for which the law of England has been celebrated*, and which is the true criterion of freedom." (v) This, it may be observed, is one of the usual modes of justifying an adherence to precedents, when the principles upon which they are founded are utterly indefensible, or, to use Lord Mansfield's expression, *shocking*. The *noble uniformity* of the law must be preserved, though it should be an uniformity of absurdity, a monstrous symmetry. Another favourite argument on such occasions, is "the danger of removing the ancient land-marks." "*Stare decisis* is a safe and prudent maxim." (w) "I do not enter into the reasons upon which all the cases have been determined, because the best rule is *stare decisis*." (x) "Though there might be great reason," says Lord Mansfield, (y) "for the doubt, (whether the leading case on a particular point of settlement law was well founded,) if the matter were again open, yet *stare decisis* is always proper." Sometimes, however, the judges, instead of pointing to the air-drawn "fetters," imagined by the "Author of Waverley," and piteously demanding, like Chief Justice Hyde—"What can we do?"—have vindicated established absurdities with becoming courage. In the celebrated case of the Dean of St. Asaph, (z) Lord Mansfield most elaborately justified the practice of confining juries, in trials for libel, to the simple fact of publication, and tauntingly declared, "that such a judicial practice, in the precise point, from the revolution downwards, was not to be shaken by general theoretical arguments or popular declamation." He was pleased also to add, that "jealousy of leaving the *law* to the Court, as in other cases, was puerile cant and declamation." The legislature, as our readers are aware,

(t) *Roe v. Griffiths*. 4 Burrow. 1960.

(u) *Doe v. Pott*. 2 Dougl. 722.

(v) *Perrin v. Blake*. *Collectanea Juridica*. 1. 312.

(w) *Mr. Justice Ashhurst, Goodtitle v. Otway*. 7. T. R. 420.

(x) *Lord Kenyon*. *Ibid.* p. 418.

(y) *Underbarrow v. Crossthwaite*. *Bur. Settl. Cas.* 545.

(z) 3 T. R. 430-1.

thought otherwise; and by the 32 Geo. 3. c. 60, entitled "An Act to remove Doubts respecting the Functions of Juries," overturned the whole phalanx of precedents, in despite of the above judicial charge of cant and puerility.

These instances may suffice to prove, that the courts *can* defer to authorities,—when they happen to be so disposed. To cite examples on the other hand, of deviations from former decisions, must be almost superfluous. Those who are acquainted with Westminster-Hall require nothing more than their daily and hourly experience to convince them of the fact, that the "fetters" of precedent may be shaken off at will; whilst every second page of the voluminous reports furnishes specimens of the various manœuvres by which this is to be effected.

Many of our readers will probably recollect the following speech of a living judge, eminently distinguished for his judicial qualifications:—"Sir, if you quote as many cases in point as there are persons in court, I shall disregard them all." (a) But this language is too bold and candid for ordinary occasions; it is far more convenient to gloss over a departure from precedent by specious reasoning and mystification. A few cases, taken at hazard out of a multitude, may serve for the information of the general reader.

To begin with Lord Mansfield—*ab Jove principium*—upon whom more extravagant praises have been lavished, than upon any judge that ever sat upon the bench,—the founder, as one of his eulogists styles him, (b) of the commercial law of this country,—a feat, be it remembered, which he performed by his own plenary power, without the participation of King, Lords, or Commons. We have seen that *stare decisis* was sometimes his maxim, and that he would not overrule a case, although it was *shocking*. In *Walton v. Shelley*, (c) however, he was in a different mood. "The old cases," he remarked, "upon the competency of witnesses, have gone *upon very subtle grounds*.—But what strikes me is the rule of law founded on public policy." So the rule of law founded upon policy became the order of the day, and the old cases were consigned to oblivion. The public had a right to suppose that the law was now settled. But no; twelve years afterwards, Lord Kenyon, preferring the old cases

(a) And why, if he has the power, should he not? Why should the blunders of one age be a rule of conduct for the succeeding? Why should a reasonable being acquiesce in absurdity and injustice, because his ancestors have acquiesced in them? Why should he not rather adopt the sensible maxim of the

civil law? "Quod non ratione introductum, sed errore primum, deinde consuetudine obtentum est, in aliis similibus non obtinet." Dig. 1. tit. 3. s. 39.

(b) Evans's Decisions of Lord Mansfield. vol. i. p. 9.

(c) 1 T. R. 300.

to the law founded on policy, declares that, as he does not find "any case prior to that of *Walton v. Shelley* against the opinion he holds, he cannot give way to that authority, great as it is;" (d) and thus overturns a decision, the result of the maturest deliberation. Lord Kenyon was not treated with greater ceremony by his successor. In 1801, he pronounced a decision (e) against the validity of an order of removal, expressing his regret at the same time, but yielding to the force of the authorities. In 1818, Lord Ellenborough says, (f) "If this Court is put under the painful necessity of overruling the case of the *King v. Moor Critchell*, in order to do justice in this case, I have no hesitation in so doing; and I wish that the very able and very learned judge who decided that case, instead of lamenting that such an objection had then been taken, had applied his powerful mind to the objection itself, and I have no doubt that it would have vanished before that mind exerting its proper vigour on the subject." And who will secure the public against the infliction of a chief justice in 1838, who shall have no hesitation in overruling the *King v. St. Mary's, Leicester*, and shall express a wish that Lord Ellenborough, instead of criticising the decision of his predecessor, had applied his powerful mind to the reasons upon which that decision was grounded?

We have seen that the Court of King's Bench could set aside all the old cases upon the plea that they had "gone upon very subtle grounds." Let us now see with what marvellous facility the same Court can, upon occasions, dispense with the clearest rules of law. "There is a rule of positive law," says Lord Mansfield; (g) "by this general rule a married woman can have no property real or personal. This is the general rule. But then it has been properly said, that *as the times alter, new customs and new manners arise: these occasion exceptions, and justice and convenience require different applications of these exceptions within the principle of the general rule.*" Upon the strength of this broad proposition, which would certainly have staggered the Medes and Persians, the Court acted for nearly twenty years, permitting actions to be brought against married women, separated from their husbands; until the ancient rule was restored to its pristine dignity by the determination of all the judges. (h) Again,

(d) *Jordaine v. Lashbrooke*, 7 T. R. 603-4.

(e) *The King v. Moor Critchell*. 2 East, 68.

(f) *Rex v. St. Mary's, Leicester*. 1 B. & Ald. 329.

(g) *Corbett v. Poelnitz*. 1 T. R. 8.

(h) *Marshall v. Rutton*. 8 T. R.

545. It is to be observed that Lord Kenyon, before this determination, yielded a very reluctant obedience to the decisions of his predecessor upon the point; and omitted no opportunity of expressing his dissent from the doctrine in the text. On one occasion (*Clayton v. Adams*.

when the Court set at defiance the rule of law called "*The Rule in Shelley's case*," the same learned lord said, "I do not doubt but there are, and have been always, lawyers of a different bent of genius, and different course of education, (alluding to his brother judge, Yates) *who have chosen to adhere to the strict letter of law*, and they will say that *Shelley's case* is uncontrollable authority. And if courts of law *will adhere to the mere letter of law*, &c." (i)

The long parliament was wise in its generation. It resisted, and fought, and conquered the king, in the king's name. The idea has not been thrown away upon the courts of law; to combat authority with authority is one of the most approved methods of shaking off an embarrassing decision:—"Without questioning, however," says Lord Ellenborough, (k) "*the report of Randall v. Eeley*, and admitting the decision to have been as *Carter reports*, it is clearly inconsistent with *France's case*, &c.; and the reason of the thing is so decidedly with those cases, that we have no hesitation in abiding by them, and holding *Randall v. Eeley* not to be law." Should there be no case in print, by which the obnoxious decision or train of decisions may be assailed, there is possibly a manuscript note of a case, which will do good service upon an emergency. (l) Or, perhaps, it may be advisable to shake the credit of the reporter, and question his exactness. "It is a

6 T. R. 605,) he said, evidently alluding to it:—"We must not by any whimsical conceits, *supposed to be adapted to the altering fashions of the times*, overturn the established law of the land."

(i) *Perrin v. Blake*. *Collectanea Juridica*, 1. p. 321.

(k) *Doe v. Beauchlerk*. 11 East, 666.

(l) "But supposing," says Mr. Watkins, "that a person should be so fortunate as to be able to extract something comprehensible out of printed contradiction, yet other contradictions may make their appearance in *manuscript*; and, overthrowing all his hard-earned knowledge, remind him once again of the *glorious uncertainty of the law*. Is the law of England to depend upon the private note of an individual, and to which an individual can only have access? Is a judge to say—'Lo! I have the law of England, on this point, in my pocket. Here is a note of the case, which contains an exact statement of the whole facts, and the decision of

my Lord A. or my Lord B. upon them. He was a great—a very great man. I am bound by his decision. All you have been reading was erroneous. The printed books are inaccurate. I cannot go into principle. The point is settled by this case.' Under such circumstances who is to know when he is right or when he is wrong? If conclusions from unquestionable principles are to be overthrown in the last stage of a suit by private *memoranda*, who can hope to become acquainted with the laws of England? And who, that retains any portion of rationality, would waste his time and his talents in so fruitless an attempt?"—*Principles of Conveyancing*. *Introd.* pp. 13, 14.

We cannot immediately call to mind the case to which Mr. Watkins thus indignantly and eloquently alludes. But there is in the 3d Term Reports, p. 749, (*Doe v. Perkins*) an unrivalled illustration of the practice. There Lord Kenyon, in order to set-

loose note, by a bad reporter ;”(m)—“It is a short note taken by Lord Raymond when he was *very young* ;”(n)—“The case in Lord Raymond is a very loose and inaccurate case.”(o) Should the decision in question have been pronounced, or quoted on a former occasion by the judge who is desirous of setting it aside, that circumstance is not, if we are to believe Lord Mansfield, an insurmountable obstacle. “Lord Hardwicke,” he says,(p) “shook the authority of *Rex v. Whiting*, which he thus, in effect, contradicts, though with guarded decency of expression, *notwithstanding his having before followed it* in the case of *Nunes*.”

But we must desist, as we are not anxious to transfer the entire Term Reports to the pages of the “Jurist.” One word as to our author’s assertion, that “there are and must be many present, who know as well as the judge, what must be the decision.” Now, we confidently appeal to those who are professionally conversant in the courts, whether it is not, in cases of importance, eternally a matter of doubt, and vague conjecture ; and whether a judicial nod, a shake of the head, an encouraging smile, or a gesture of impatience, during the argument, are not far better indexes to the approaching decision, than Moore, or Hammond, or Harrison.

Let not our continental neighbours, then, be seduced by the winning rhetoric of “The Author of *Waverley*,” to covet a system of laws,—if system it can be called—which “spreads through a multiplicity of volumes, and embraces an immense collection of precedents.” We unfeignedly wish them every civil and political blessing, that the fondest heart amongst them can desire. We wish them all that we prize in *our* institutions, superadded to all that is valuable in their own. We wish them a *habeas corpus* act, without the liability to arbitrary suspension :—publicity of procedure, carried to its utmost limits :—an unshackled press, with an intelligible and rational law of libel :—and the free circulation of public opinion in all its healthful vigour. But we do *not* wish them the blessings of *case-law*. Let them wait with patience. Soon enough in the natural course of events, will their own law exchange its present fair proportions, its order and perspicuity, for unwieldy bulk, confusion,

tle a point of evidence, produced from his pocket a note from a MS. of Lord Ashburton of an anonymous case that had occurred at Lincoln’s-Inn Hall, before the Chancellor, thirty-seven years before ; and on the following day Mr. Justice Bullen, not to be behind-hand, read another MS. note of a case at the Hereford Spring Assizes, 1736, which was

only thirty-four years old.—See *Bentham’s Rationale of Evidence*. 2. 21, for a dissection of the main case, and its MS. supporters.

(m) Lord Mansfield. *Douglas*. 305.

(n) Lord Kenyon. 3 T. R. 261.

(o) Mr. J. Buller, 3 T. R. 263.

(p) *Abrahams v. Bunn*. 4 Burrow. 2254.

and darkness. Ignorance will mistake, chicanary will misinterpret, sophistry will perplex, pedantry encumber, authority will strain, caprice distort, and sinister influence suppress; exposition will rise upon exposition, and gloss upon gloss; until the plain intent and letter of the law will sink under the mass of superincumbent commentary, stifled like the Roman Emperor Tiberius, "*injectu multæ vestis*." All this will come upon them in the fullness of time. But let them not long for premature decay; let them not envy us the *certainty* of a system, which must have been powerfully present to the mind of the poet, when he wrote:—

Chaos umpire sits,
And by *decision* more embroils the fray,
By which he reigns: next him, high arbiter,
Chance governs all.

ART. V.—CIVIL AND CRIMINAL JUSTICE IN THE WEST INDIES.

1. *First Report of the Commissioner of Inquiry into the Administration of Civil and Criminal Justice in the West Indies. (Barbadoes, Tobago, Grenada.) Dated the 16th Day of May, 1825. Ordered, by the House of Commons to be printed 5th July, 1825. Folio pp. 310.*
2. *Second Report, &c. (St. Vincent, Dominica.) Dated 6th March, 1826. Ordered by the House of Commons to be printed 18th April, 1826. pp. 287.*
3. *Third Report, &c. (Antigua, Montserrat, Nevis, St. Christopher, and the Virgin Islands.) Dated October 5th, 1826. Ordered by the House of Commons to be printed 11th December, 1826. pp. 283.*
4. *Substance of the Three Reports of the Commissioner of Inquiry into the Administration of Civil and Criminal Justice in the West Indies. Extracted from the Parliamentary Papers, with the General Conclusions, and the Commissioner's Scheme of Improvement, complete and in full. London; Butterworth and Son. 1827. 8vo.*

IN Europe, particularly in some northern islands, it is held that there is one law for the rich and another for the poor. The valuable reports which introduce this article prove that the *colour* of the human species in our *West India* islands determines the claim of the colonists to the benefits of that precious commodity—justice. The *whites* have one measure of law. the

free people of colour another, and the *blacks* none! The administration of justice in such a state of society must needs be grossly defective, especially when it is considered that a group of islands imported their laws and judicial establishments with the first settlers two hundred years since; that their anomalous and corrupt system of jurisprudence consequently labours under the evils of barbarous origin, and that all the improvements it has received have been the occasional and partial alterations demanded by absolute necessity.

The crying evils of the colonial administration of justice at last reached the mother country. The British legislature and the public press of England excited attention to the misrule which had so long and hopelessly prevailed in these distant dependencies of the empire; and under the colonial dominion of Lord Bathurst, a *Royal Commission* was appointed in 1822, of two Commissioners, with certain instructions, and a subsequent extension of their original powers, to inquire into the administration of justice, as well civil, as criminal, in all the islands named in the Commission, viz. Barbadoes, Tobago, Grenada, St. Vincent, Dominica, Antigua, Montserrat, Nevis, St. Christopher, and Tortola.

The gentlemen selected for the important duties of this commission were barristers; Mr. HENRY MADDOCK, well known at the Equity Bar for an original and logical treatise on the principles and practice of the Court of Chancery, and Mr. FORTUNATUS DWARRIS, a member of the midland circuit. Mr. Maddock early fell a sacrifice to the dire effects of the climate on a feeble European constitution; and the Reports we believe, or rather, their composition, are nearly the sole production of Mr. Dwaris. It is, however, due to the memory of Mr. Maddock to record the valuable assistance he rendered to the objects of the Commission, and the increased aptitude his co-operation must have given to Mr. Dwaris. We think that a little more testimony might have been afforded to the merits of the deceased Commissioner: he may be truly said to have fallen in the service of his country, and to have equally merited a national monument with the naval and military heroes who first aggrandised their native land by the discovery or conquest of the colonies.

From such bulky reports, comprising one thousand folio pages, the reader must not expect any minute details of the separate laws of each island, or the different courts of judicature. The reports enter with great particularity into the state of the colonial jurisprudence; what portion of it was derived from the mother countries and what is simply *local*; detailing the editions, manuscripts, history, and duration of the laws of each island. The slave laws engaged the especial attention and inquiry of the Commissioners, and humanity shudders at the disclosures of the hor-

rors of slavery. (a) The wretched beings are first torn from their country, degraded, and then pronounced incapable of moral culture !

The Reports severally detail the constitution and procedure of the CIVIL Courts, viz. the Chancery, Exchequer, Common Pleas, Ordinary, Admiralty, Appeal and Error, and Escheat: the CRIMINAL Courts of Grand Sessions, Quarter Sessions, and Slave Court. The duties of the different officers of these jurisdictions are then reported, and numerous cases of individual complaints are recorded in the Appendix. The general evils of the judicial system are classed under—irregularity, delay, uncertainty, and expense. In a few words, the interests of *four fifths* of the persons subject to the laws and affected by their administration are sacrificed to the civil disabilities consequent on *colour* !

As far as relates to the LAWS of these different islands, the examinations of the chief persons administering them, and the returns of the public officers, prove the necessity of revision and consolidation, and an extensive change in the judicial system of the colonies, from a total want of any fixed principles of jurisprudence. The original and received law of the colonies was said to be the English "Common Law;" also the acts of parliament, passed before the settlement of the colonies; that is to say, those English statutes passed *antecedently*, making, as will be perceived by the subjoined table, a difference, in some cases, of two centuries :—

(a) It is ingenuously mentioned by the Attorney-General of Grenada that he had heard of a man being hanged for killing a slave; and that in some islands he had occasionally prosecuted those who tortured slaves for *misdemeanors* ! *videlicet* : he prosecuted Wadham Strode for fastening his negro by the ear to a post, from which he ran away, leaving part of his ear behind. The same official gentleman also records that he punished one Burke for excessive severity in chaining and punishing his negro woman; and another man for cruelly gagging and ill treating infant slaves. He also mentions that he prosecuted a man in Nevis who had murdered his slave by scorching his body in some cane trash, and afterwards putting him into a cask of rum ! Slave evidence is not even admitted against free persons in cases

where other evidence is unattainable. Thus a free man who had murdered a black woman was not convicted because the dying declaration of the murdered slave could not be admitted in evidence against him. In this case, a dollar, the *pretium amoris*, had been paid to the deceased by the prisoner: after the gratification of his passions, the fellow insisted on the restoration of the silver; the girl resisted, when the brute stabbed her with his bayonet, and left her bleeding on the ground, a little way in a wood; in which situation she was discovered shortly after, in a dying state. She gave this tragic account (which could not be received at the trial) before she expired ! The barbarian escaped conviction. Such is the "*Criminal Justice*" of the West Indies.

In Barbadoes	to 1627
In Tobago	to 1814
In Grenada	to 1763
In St. Vincent	to 1763
In Dominica	to 1763
In Antigua	to 1632
In Montserrat	to 1625
In St. Christopher	to 1713
In Nevis	to 1625
In Tortola	to 1774

All the islands, therefore, *ipso facto* stand in need of judicial reforms. In Barbadoes there were two hundred and forty seven laws in manuscript in 1822, and the judges, who were *ex officio* bound to know them, however inaccessible, were not lawyers.

In some islands the Governor or Commander-in-chief is the sole judge of the *Court of Chancery*: in other islands that Court is composed of all the members of council, as well as the Governor, the latter being only *primus inter pares*, and the votes being taken in regular order, beginning with the junior councillor! The latter constitution is considered the most objectionable, the administration of justice being less dignified, more *uncertain*, and generally distrusted and hated in a degree commensurate with its power of doing mischief in the colony. The equity judges, besides their frequent connection with the litigant parties, from a total want of legal education are exposed to continual errors, and by the want of public confidence in their decisions create extra expense, uncertainty, vexation, and delay. The costs of proceedings in the Court of Chancery, although no stamps are used, are oppressive and ruinous, and require an entire revision, especially the appointment of an independant taxing officer. Masters in Chancery in these islands, though they receive and pay monies, seldom give security for the due discharge of the duties of their office. The per centage in general allowed them is *two and a half per cent.* on all monies received and paid. This they construe to mean, two and a half per cent. on monies received, and two and a half per cent. on the same monies paid—a truly beneficial trust. In Tobago, the Master, upon sales in his office, received the shameful fee of *six* per cent. Receivers to estates do not always account regularly for the proceeds, &c. of a plantation; and, what is a more serious evil, they commonly give no other than their personal security (without sureties,) against mal-administration. The consequence is, that when they die insolvent, having wasted the effects, (a very common occurrence,) there is no remedy over. In the case of excutors there exists in all the islands a most deplorable defect in the administration of justice. The Commission-

ers report that "the complaints of widows and orphans (white and coloured) excited our deep commiseration, and we were persuaded that their distress and that of others in equity cases, arises principally from the want of a due administration of the powers of a court of equity." The Attorney-General of Dominica thus concluded his observations upon the Court of Chancery in that colony:—"But the great *desideratum*, that would bring gladness and joy, which alone could afford security and confidence to the colonists, would be the appointment of a lawyer of tried knowledge and ability, to fill the important situation of Chancellor. I consider that this measure would enhance the value of property at least *fifteen* per cent."

In the *Common Law Courts*, the chief justices very often, and the assistant judges always, consist of persons who are not lawyers, and the consequences, as might be imagined, are frequent misconceptions of the law, constant liability to error, total want of confidence in decisions, and universal discontent. In Barbadoes, St. Christopher, Montserrat, Nevis, and the Virgin Islands, the chief justices are not lawyers, though sometimes intelligent and honest men; and there is no where a second lawyer upon the bench. If all persons not educated to the law were excluded from the situation of judges, a large and respectable class of merchants and planters would be remitted to fill the really useful duties of town and country magistrates, at present in obscure hands. The further advantage would result of securing the supply of a greater number of competent persons to act in the capacity of grand, and of special jurors.

A revisal of the practice of the different courts is proposed by the Commissioners an uniform code of practice for all the islands: in the preparation of this code all the court acts of the islands to be carefully consulted; what is useful in them retained, what is obsolete or impracticable rejected, and such alterations made, as an attentive consideration of the subject shall discover to be necessary.

New tables of fees of all the courts; a careful resettlement of the costs to be allowed upon taxation; and the appointment of proper persons to discharge that important duty, are measures which the Commissioners recommend as indispensable.

The Court of Error, or Appeal and Error, appointed to review the decisions of a lawyer-judge, (in those islands in which the chief justice is a barrister,) is composed of a military or naval governor, and three or five planters, who, it may be seen, by referring to the reports upon the islands of Montserrat and Tortola, when delay will serve a friend, can never make a quorum.

The reports notice the miserable condition of the gaols in all the islands, and the utter abjectness and wretchedness of the gaol

system in general. In these dungeons are confined, and very often promiscuously, debtors; all persons charged with offences, slaves, as well as others; convicts; prisoners of war; lunatics; delinquents under the militia act, and slaves taken in execution. This appalling subject of contemplation is still more melancholy when we reflect that slaves are "*taken in execution*" for their masters' debts, and not merely immured in prison for their own delinquencies. It is one of the allegations contained in a petition presented by the merchants of St. Vincent to the legislature of that island:—"That many negroes, levied upon to satisfy executions, are, through the inability of their owners to obtain security for their production at the end of forty days, confined in gaol until the day of sale, when probably they are remanded back to gaol, from the failure of purchasers, to await another sale; that, during such unmerited confinement, they despond and contract diseases which reduce their value at the day of sale very considerably." And, to their honour, the merchants humbly pray, that the legislature will be pleased to "ameliorate the condition of negroes levied on and imprisoned without crime, from the inability of their owners to procure security for their production at the day of sale."

The political and judicial state of the slaves and the slaves' courts occupies a considerable portion of all the three reports. Slaves, who should, under any circumstances or mitigation of slavery, be subject to the same mode of trial in criminal cases, as free persons, are tried differently in different colonies. They labour under odious and cruel disadvantages. A slave is under a personal disability, and cannot sue in any court of law or equity, not even in respect of injuries done to him by other slaves. A slave cannot prosecute in the criminal courts; he cannot enter into a recognizance, and can, therefore, only be *bailed* by free persons, when they *can* be found so far disposed to assist him, which the master commonly is, and no one else. Slave evidence is not admitted against freemen, whites or blacks, even against wrong-doers. In those courts and cases, where slave evidence is occasionally admitted, it very often is not upon oath, and, as opposed to the unsuspected testimony of sworn witnesses, is consequently to a certain extent disregarded. We need only appeal to the common principles of justice against this monstrous iniquity; and the effects consequent on the introduction of trial by jury among the natives of Ceylon (*b*) are an unanswerable reply to the objections of bigoted West India task-masters, who think, *qua* slave, a negro cannot be humanized.

If the property of a slave is taken from him, he cannot per-

(*b*) Jurist, No. I. Art. X.

sonally seek redress. His master, it is said, may bring *trespass*; this, however, is very insufficient, for he also *may not*, and if he does, and none but slaves are present at the infliction of the injury, as is likely to be the case, there can be no satisfactory proof of the fact. The owner suing, or prosecuting for his slave, must establish his case by competent evidence, and cannot prove the fact by the testimony of black persons under legal disabilities. "Laws for defining the civil rights of slaves, and for protection in the enjoyment of them," said the king's counsel at Nevis, "I conceive among the first *desiderata*." The Commissioners report their firm conviction that the foundation of every improvement, both as regards the white and black population of these colonies, must be laid in an improved administration of justice, and in the admission of slave evidence. (c)

Unquestionably the first reception of slave evidence would for a long time require great judicial caution and discrimination. In criminal cases it is indispensable. Mr. Dwaris makes some judicious reflections on the common-place argument against its general reception in civil causes.

"Even assuming the general character of slave evidence to be of the insidious and perilous nature represented by some of its opponents, (though it is remarkable, that the majority of the judges and crown-officers speak of it as 'correct' and to be depended on,) still we think, the dangers apprehended from its admission are not only exaggerated, but, as will appear upon inquiry, absolutely without foundation. For, first, it should be remembered that such evidence, if receivable, would be subject to the test of cross examination by acute and practised advocates; secondly, it would be stated and commented upon by a learned and careful judge; thirdly, it would be submitted to a suspicious and sagacious jury, whose prejudices, if they entertained any, are not likely to be in favour of the evidence. Under these circumstances, it is difficult to conceive the fabricated tale or concerted charge that would not be speedily detected. Indeed, in the only instance that was mentioned to the Commissioners, of a conspiracy to prefer a false charge affecting the life of another, in which the slaves were instigated by vindictive motives, so clumsy was the fabrication, so inartificial the contrivance, that it was instantly detected on comparing the testimony given at the trial with the written depositions taken before the magistrates. Still it would be highly proper that such uncertain testimony should be received with the greatest caution; none but persons certified by their religious teachers to have a due sense of the obligation of an oath should be admitted as witnesses; the credit of their testimony should be open to observation, and its weight, upon all occasions be nicely sifted; it might

(c) The inadmissibility of slave testimony seems peculiarly to limit the consumption of *physic*. "A medical practitioner," said a complainant in one of the islands to the Commissioners, "cannot at the trial prove his being *called in*, for it was

by a slave, not known, perhaps, to his own people. He cannot prove the medicine supplied, for there are usually only slaves present in attendance upon the sick person."—*Tortola, Third Report*, p. 90.

even be safe, in extreme cases, not to act upon such testimony, unless it were supported by other proofs, positive or circumstantial; and experienced persons are disposed to attach more importance to the conformation of circumstances than to the accumulation of testimony. At all events, I should certainly recommend that no execution should take place in any capital case, when the conviction proceeded entirely upon slave evidence, without a careful review of the case before the Governor in council, (and I suppose the Chancellor to be a member of the council,) assisted by the Attorney-General, having before them the notes of the judge who tried the prosecution, and requiring a certificate under his hand, that *he* approved the finding of the jury."

The policy and justice of admitting the free people of colour (whose numbers are continually increasing,) to an extension of civil privileges, and indeed the title of some among them to a participation in all political rights, is boldly contended for in the report. The prejudices, however, of the *white* aristocracy against even the party-coloured natives of the island is scarcely credible: the Commissioner states his conviction that no white West Indians would sit in the same jury-box with free persons of colour!

We should too far extend this article to enter minutely into all the remedies suggested by the Commissioner for the present mal-administration of justice in these colonies. They will be found in detail in p. 110 of the Third Report.

On the state of the laws the Commissioner reports that the common law is involved in obscurity, and difficult of application; and particularly that different opinions prevail as to its application to the cases of slaves in different islands.

In the administration of the laws, the constitution of the Court of Chancery is reported to require great alteration. The costs of equity require revision and the appointment of a taxing officer. The office of the Masters in Chancery needs regulation, and their fees reduction. Receivers to estates ought to be made to account regularly, and to give more effectual security.

In the *Common Law* Courts it is suggested that the judges should be lawyers, and the present assistant-judges changed into grand and special jurors. It is further proposed that the *practice* be revised, and greater uniformity introduced into courts of one district; that new tables of fees be established; and that the *Rules of Court* after being framed by the judges, be approved and confirmed in England. Further improvements in the *Complaint* Court and in the *Criminal* Courts are recommended, and the establishment of Commissions for Admiralty Sessions. The present constitution of the Court of *Error* is strongly reprobated, and the system of *Appeal* exposed.

The establishment of a circuit throughout the islands is the principal remedial proposition, with the appointment of two chief justices; one an equity judge for each district; a district attorney-

general, a resident puisne judge in each island, and solicitor general, the latter to be also protector of slaves, defender of the absent, and guardian-general of minors.

Such is the brief abstract we are able to give of such voluminous documents; and in thus abridging the principal topics we have adopted *ad libitum* occasionally the words of the reports. On an attentive perusal of the three Reports and Appendices, we regret that a more analytical and remedial work was not prepared by Mr. Dwaris. We look in vain for any knowledge of the principles of legislation and philosophical jurisprudence. Mr. Dwaris writes of "the remedies, both general and partial, which, with great *submission*, and subject to your Lordship's approbation, I respectfully and very *cautiously* propose to supply." It was for Mr. Dwaris boldly and not submissively to report to Lord Bathurst: the Commissioner, not the colonial secretary, was the person expected to propose remedies. It is, however, evident, industrious and conscientious as Mr. Dwaris may have been, that he was not fully qualified for the important duties of the Commission. The death of Mr. Maddock was most unfortunate, and, we repeat, that a more ingenuous and deserved tribute to *his* labours might have been paid by the surviving Commissioner.

Some reflections have been made on the reports of Mr. Dwaris, because he was the proprietor of West India estates: we confess we do not see that *that* influenced unworthily his report; but unquestionably a West India proprietor was not the most fitting person for the objects of the commission.

We trust that early in the ensuing session of parliament these reports will be referred to an able and disinterested committee of the House of Commons, and that they will not merely be "taken into consideration," but acted upon. Surely some members of the legislature of the "West India interest" will interest themselves in removing a mockery of justice unparalleled in the colonial history of any other country on the face of the globe. Not merely the ends of justice, but the safe tenure of their own property will be secured by the judicial reforms in question. The country hopes much from the intellectual and political power of Mr. Huskisson,—may it not be disappointed.

In our succeeding number we may probably review the two recent Reports, of the Commissioners of Legal Inquiry, or Civil and Criminal Justice in Jamaica and Trinidad, the first by Mr. Henry and Mr. Coneys, and the second by Mr. Henry and Mr. Dwaris.

ART. VI.—AMERICAN LAW.

IN a former number^(a) we endeavoured to give a general outline of the state of the law among our Transatlantic brethren; we are at present enabled to furnish our readers with some of those details that possess the greatest interest for foreigners. These we publish in their most authoritative shape, as Queries and Answers,—the Queries proposed by the senior Commissioner^(b) of Inquiry into the Administration of Justice in the British West Indies,—and the Answers given by a distinguished member^(c) of the bar at New York, one of the Commissioners appointed to revise the Statute Laws of that State. The answers to Queries 14 and 15, upon the degree of influence possessed by the English Common Law and precedents in the different States of the Union, upon the progress made in the study of jurisprudence, and upon the legal reforms in contemplation in the State of New York; and the whole of the answers under the head of “Slaves,” are peculiarly entitled to attention. The points involved in some recent decisions of Lord Stowell are slightly touched upon under the latter head.

BANKRUPTS.

Question 1. Would a discharge duly obtained by a foreign debtor in his own domicile protect him from a suit here by an American creditor who had notice of the commission, and time to prove under it, the debt being supposed to be contracted in the bankrupt's domicile?

Answer. I think the general tendency of our judicial decisions (though not without exceptions) has been to give effect to a discharge fairly obtained in the country where the debt was contracted, even against our own citizens, creditors of the bankrupt. But some of our *state* courts have restricted the operation of such discharges to the citizens of, or persons domiciled in, that particular state where the discharge was obtained, and the supreme court of the United States early determined the principle, that our courts could not take notice of the title of foreign assignees, against the claims of creditors resident and attaching in the United States, nor against the priority of the government as to its debtors.—(*Cranch's Reports*, Vol. v. p. 289, *Harrison v. Sterry*.) So that although foreign assignees are permitted to sue in the United States, *ex comitate*, yet their title to the bankrupt's effects is not allowed to prevail against the claims of his creditors, citizens of

(a) No. I. p. 22. (b) Mr. Henry. from the United States to the Court
(c) Mr. Wheaton, now minister of Denmark.

that country. And it may be considered as doubtful, since the judgment of the supreme court in the case of *Ogden v. Saunders*, (*Wheaton's Rep.* Vol. xii. p. 213,) whether a foreign discharge can be pleaded in the United States in bar of a suit for a debt, wherever contracted, unless as against a creditor subject to the jurisdiction of the country where the discharge was obtained: i. e. whether a British subject (for example) could plead his certificate of bankruptcy obtained in England against an American, or other creditor, not a British subject, and not domiciled in England.

Q. 2. Would a bankrupt fleeing from his commission in England be allowed to sue his debtor in the courts here, after his legal disability had taken place by operation of law in England?

A. Although the title of the assignees under a foreign commission of bankruptcy will not be permitted to interfere with an attachment by one of our citizens (his creditor) of debts due to the bankrupt in the United States, yet if the bankrupt himself should attempt to collect those debts, the right of his assignees would (as I conceive) be preferred in our courts. It follows, I think, as an inevitable corollary from the assignees' right to sue in any case, that their title must always be preferred to that of the bankrupt, as I suppose it would always be to that of his creditors, subjects of and domiciled in the country where the discharge was obtained.

Q. 3. In case of bankruptcy or insolvency on the part of an American trader, can the local creditors in any state obtain a preference over the foreign creditors, by any local process of attachment, or otherwise?

A. In several of the states, the creditors, whether resident, or represented by their agents, may gain a preference over others, by a prior attachment, in the nature of a *foreign attachment*, under the custom of London, or otherwise. In others of the states, the attachment is made by one or more, for the benefit of all the creditors.

Q. 4. Do you conceive that the notice given to foreign creditors, before an American debtor obtains his discharge in his own state, sufficient for all the purposes of justice, and are there any complaints of the term of the notice under an English commission in this respect?

A. Not having the statutes of the different states of the Union before me, I am not able to answer this question with the requisite precision, so far as respects the American laws; but the notice to foreign creditors under the British statute, 6 Geo. 4, c. 16, for amending the bankrupt laws, is certainly too short for the purposes of justice.

Q. 5. Supposing an American trader to commit an act of bank-

ruptcy in one state, and to possess effects in several states of the Union, which place would be the *locus concursus creditorum*, or which would have jurisdiction as to the general distribution and discharge in this case, and would the circumstance of the act of bankruptcy being committed out of the regular fixed or ordinary domicile of the trader make any, and what difference?

Q. 6. Supposing the trader to have several firms in the several states, how would the respective creditors be ranked in such case?

A. to Qs. 5 and 6. We have, at present, no general bankrupt code, and the laws of the particular states do not proceed *in invitum* upon the notion of an act of bankruptcy committed by the insolvent debtor, but upon his own voluntary application, or the joint application of himself and his creditors. In the case put in query, No. 5, if any contest should arise as to the insolvent's effects in different states, under the various attachment laws, it would be determined upon the general principles of international law, and not by any rule peculiar to the jurisprudence of America.

Q. 7. Do you experience any difficulties from want of a general and uniform code of bankrupt laws for the several states of the Union?

A. Many inconveniencies are certainly experienced for want of uniform laws of bankruptcy throughout the union. But though Congress is empowered to make such laws, much difficulty has occurred in endeavouring to form a system suited to the various wants, habits, and institutions of twenty-four different states. These difficulties have been a good deal magnified by the opponents of the measure, who have fortified themselves by arguments drawn (among other sources) from the real or supposed abuses in the administration of the British bankrupt laws as developed in the reports to the House of Commons, and other discussions which have recently taken place in England.

Q. 8. Can two or more concurrent commissions exist against the same party in respect of his property in different states?

A. The eighth query seems to be already answered. The form of proceeding under the state insolvent laws is not by a commission of bankruptcy or sequestration: and any conflict of jurisdiction which might arise under the discordant provisions of the attachment laws of different states, would be determined upon the general principles of universal law applicable to such questions between different nations.

Q. 9. Has the state, as sovereign, any lien or privilege on the property of its debtor or accountant, in the case of insolvency or default, similar to that of extents in England?

A. Each state of the Union and the government of the United States have by law a right of priority or preference in payment

over private creditors on all the property of their debtors. If there be a conflict between the privilege of the United States and that of a particular state, the claim of the latter must yield to the former. The sureties of such debtors are privileged in the same manner; and all assignees, whether under the bankrupt laws, or composition deeds, as well as executors and administrators, are bound to pay all debts due to the United States before they pay any private debts.

Q. 10. Do you conceive that a general bankrupt code for commercial Europe, and America and the colonies, recognizing in common merely, and giving effect to certain general and fixed principles, leaving the detail and localities of the proceedings to each particular state, would, if practicable, be beneficial?

A. Such an international bankrupt code would doubtless be beneficial; but I should think the difficulties in establishing it by general consent would be found almost insuperable.

Q. 11. Is bankruptcy considered in the United States as savouring of crime according to the old commercial law of Europe, or how otherwise?

A. Bankruptcy is not, generally speaking, considered as savouring of crime; but the bankrupt law of the United States, enacted in 1800 (now no longer in force), punished certain offences against its provisions criminally. Any attempt, however, to punish offences against the policy of the bankrupt laws capitally, would not be endured in America.

In this connection it may be useful to mention that if the doctrine of the supreme court in *Ogden and Saunders* (*Wheaton's Rep.* Vol. xii. p. 213.), should ultimately be established as a part of our settled jurisprudence, foreign creditors (who have the privilege of suing in the federal tribunals) will encounter no obstacle in the local state insolvent laws to the recovery of their debts, a discharge under those laws not being considered as a bar to a suit in the Courts of the Union.

FOREIGN DECREES AND APPOINTMENTS.

Q. 12. How far does the appointment by a foreign judge of guardians, receivers, curators, or committees of persons or property take effect in the United States?

Q. 13. Supposing a foreign judge to appoint a curator to a prodigal, or committee to a lunatic, and the party to come to the United States with his curator or committee, could the judge of his actual domicile here in such case relieve him from this legal incapacity under the foreign appointment, on proper application and investigation as to his disability to manage his affairs having ceased?

A. to Qs. 12 and 13. I am inclined to think that a very limited

effect, if any, would be allowed in the United States to such appointments: and, in general, it may be safely answered that no greater effect would be allowed to them than by the law of England.

Q. 14. Do you consider the English precedents and decisions, either in law or equity, as having any, and what force in the American courts?

A. It would not be easy, within the compass of reasonable limits, to give a full and satisfactory answer to this question. In general, it may be stated that the law of England, in its broadest sense, including the system of common law and equity, is the foundation of our jurisprudence. Except such parts of the common and statute law as never were applicable to our local circumstances and condition, or such as have become inconsistent with the nature of our government since the Revolution, it is every where regarded as the rule in cases not provided for by our own positive institutions. But in some of the states, the reports of English adjudications subsequent to the Revolution are expressly forbidden from being read as authority in the courts. In others, as in New York, the decisions of the English courts since the declaration of independence, 1776, are not considered as of binding authority: and the entire system of common law and equity, as applicable to this country, has been greatly modified by local statutes and by the adjudications of our own courts, which now form a great body of jurisprudence peculiar to the United States, although it has been formed with a general reference to the analogies of English law.

The State of Louisiana forms an exception to what has been said. The original basis of the law of that province was the Roman civil law, modified by the French and Spanish codes, introduced by its successive masters. Since its acquisition by the United States, the institutions of trial by jury and the *habeas corpus* have been extended to that part of the Union. All criminal cases are tried by jury, but in civil cases issues of fact are tried by jury at the option of either of the parties who may insist upon that mode of trial. The civil code of the country has been recently revised, and Mr. Livingston is now engaged in preparing a penal code, and a code of prison discipline.

The system of equity as administered in the High Court of Chancery of England, has been adopted in New York and several other states, so far as is applicable to our local situation and circumstances. But the jurisdiction of the Lord Chancellor in bankruptcy, lunacy, minority, and over charities, is not exercised (as a matter of course) by our Chancellor; and in cases where this peculiar jurisdiction is exercised, it is vested in him by special

statutes with certain modifications applicable to our condition. In some of the states, the general system of equity has been partially received, and with very great modifications: In those states where it has not been introduced, the courts of law have found it necessary to adopt and act upon the doctrines of equity in the determination of legal rights, to a far greater extent than in England. But the jurisdiction of the courts of the Union (which have cognizance of suits by aliens and between citizens of different states,) extends to all cases in equity as well as at law; and the practice is modelled upon that of the High Court of Chancery in England. It should be observed, however, that our Chancery practice has been very much simplified; the expences of an equity suit are much less than in England; and the delays are not greater, if they are so great, as in an action at law. An account of the practice will be found in Mr. Johnson's *Chancery Reports*, and in a work published by Mr. Hoffman upon the practice of the Court of Chancery of New York.

In the supreme court of the United States, and in the supreme tribunals of several of the states, a regular series of reports is published by *official reporters, who receive annual salaries from the government as an encouragement to their labours*, and the decisions have also been collected in Digests or Indexes, for the purpose of ready reference. Various elementary treatises and compilations upon different branches of the law have also been published, and these different works have already swelled to a sufficient number, to form a considerable library. The number of reports amounts to 250 volumes, and at least fifteen volumes are added to these every year. Nearly all the English common law and equity reports, and many of the elementary treatises published in England, are republished in America, with annotations by our own lawyers.

Our professional men have also recently turned their attention to the study of the Roman civil law, and its maxims and principles are familiarly resorted to for the purpose of illustrating and expanding the doctrines of the common law, thus adapting them to the wants of a more civilized and commercial age. In several of our universities and colleges, professorships of the municipal law and of general jurisprudence are established, and a faculty of law is attached to the university at Cambridge, where the resident graduates, and other students who resort to the school receive instruction both in the common and civil law. A law academy has been established at Philadelphia, where instruction is communicated in courses of lectures and exercises. There are also several private law-schools in different parts of the country, where courses of studies, preparatory to admission to the bar, are carried on under the superintendence of eminent judges and barristers,

some of whom are retired from practice, and others are engaged in it. Of the private law-schools, that of Judge Gould at Litchfield, in Connecticut, of Chancellor Kent at New York, and of Mr. Hoffman at Baltimore, are the most distinguished. Extensive courses of lectures are given by these gentlemen, accompanied with oral instruction, and illustrated by exercises in most courts and debating societies. The students have the use of the valuable libraries belonging to the professors, whilst in the great towns they have also the advantage of a regular attendance on the courts.

The interpretation of our written constitutions of government has given rise to a great number and variety of questions of judicial cognizance, the decision of which has already formed a body of constitutional law peculiar to America. The adjudications respecting it will be found scattered throughout the Books of Reports and collected in several elementary works, compilations, and abridgments. Among these are Chancellor Kent's Lectures, and Mr. Serjeant's book entitled "Points of Constitutional Law." "The Letters of Publius," or the *Federalist*, comprise a series of papers written by Mr. Maddison, Mr. Hamilton, and Mr. Jay, and published at the time of the adoption of the Federal Constitution in 1788. This work is justly regarded as of great authority on questions of cotemporaneous construction, and is used in several of our universities as a text book of instruction in the science of government. The question, how far the common law of England ought to be considered as applicable to the United States at large, considered as a federal government, and to be adopted as a rule for cases arising in the tribunals of the Union, where no written law has been provided by Congress, or where the application of the written law requires the aid of supplementary rules, has been much discussed both at the bar and by elementary writers. A very clear statement of the different views which have been taken of this subject will be found in a treatise published by Mr. Duponceau, of Philadelphia, on the jurisdiction of the courts of the United States.

Q. 15. Is the common law of England considered as the common law of each state of the Union co-extensively, or does it differ in degree, and by what rule is it determined that it is of force in any particular state or case?

A. The common law has been adopted in the different states in various degrees, according to the successive epochs of their colonization, or the spirit and genius of their original legislators. Whether the common law be applicable in any particular case, is determined in each state by the statutes thereof, ancient usage, or the decisions of the courts. In most of the states the leading provisions of the statute of Wills, Hen. VIII. ; of Limitations, of James I. ; the statutes of Frauds, of Elizabeth and Charles II. ;

and the Habeas Corpus Act of 31 Charles II. ; have been adopted, with the whole body of English decisions interpretive of their text. In some of the states, the older British statutes modifying the common law have been expressly adopted : in others they have been repealed, and their most important provisions reenacted. In all, a great mass of local statute legislation has accumulated, and efforts are now making to clear it from the confusion occasioned by the successive additions which have been made to it since the earliest colonial times, without much regard to method, and frequently for the mere purpose of providing for some temporary evil or inconvenience.

The practicability and usefulness of reducing the whole body of the common and statute law, including the system of equity, to a written text, has been recently much discussed in America. The great variety of the sources of our jurisprudence, its complexity constantly increasing with the multiplication of new laws, and new adjudications upon the old *immenso aliarum super alias acervatarum legum cumulo*—the inherent uncertainty of all unwritten law depending on conflicting precedents and analogies—have forcibly impressed the public mind with the desirableness of such a work. But the difficulty of accomplishing it, and of preserving it from being overrun (as all other codes have hitherto been) by a new wilderness of glosses and interpretations, has not been disguised or underrated by those who distrust the consequences of so extensive an innovation. The nearest approach which has yet been made to such an attempt in any of our states, whose jurisprudence is derived from the common law of England, is the revision which is now being made of the statute laws of New York. By an act of the legislature, passed in April, 1825, commissioners were appointed to revise and consolidate the statutes of that state upon a plan approaching to that of a code. By the provisions of the act, the commissioners were authorized to revise all the written laws of the state ; to consolidate all acts and parts of acts relating to the same subjects ; to distribute them methodically under proper titles and divisions ; to suggest the best mode of reconciling apparent contradictions, supplying defects, and amending what required alteration ; to designate what ought to be repealed, as mischievous or useless, and recommend the passing of such new acts as might be expedient or necessary to complete the system ; and, finally, to complete the revision in all other respects in such a manner as they might deem best adapted to render the laws more plain and easy to be understood. Under the authority thus given to them, the commissioners have made a classification of the laws to be revised under the following general divisions : 1. Those which relate to the territory, civil polity, and internal administration of the state. 2. Those which relate to private rights, or what is

commonly included in a civil code. 3. The judiciary establishment and civil procedure. 4. Crimes and punishments. 5. Local laws and municipal incorporations. These were again subdivided into chapters, titles, articles, and sections, according to a scientific arrangement of the matters included in these different sub-divisions. No enacting clause is proposed to be introduced except at the head of each of the five general divisions, where it is to be preceded by a short preamble, setting forth the expediency of consolidating, arranging, simplifying, and amending the statutes relating to the subjects included in that division. In drawing up the text, the great object in view was to free it from inconvenient verbosity; to distribute it into short sections, each containing a single proposition; to avoid, as far as possible, all ambiguities of expression; and by simplifying the language, to render it more clear, precise, and intelligible. In exercising the power given to them of suggesting alterations and amendments, the commissioners have proposed draughts of the revised statutes, as they would appear after the contradictions, omissions, or imperfections in the existing laws should have been remedied, and after the parts proposed to be repealed should have been omitted; on the supposition that the expediency of such alterations would best be explained and understood by an actual exhibition of the text, as it would stand after the proposed changes had been made, and in connexion with those provisions of the present laws which are intended to be retained. What has been said refers to the phraseology, style, and arrangement of the proposed new digest of statute laws. But it will be necessary to refer to the printed reports of the Commissioners, and drafts of bills annexed, to form an adequate notion of the extent and importance of the substantive alterations proposed by them. These are most considerable in the first division of the work, which relates to the territory, the political divisions, the civil polity, and the internal administration of the state. The plan of the revisors was most easily adapted to this portion of the statutes, it having grown out of our peculiar institutions and local condition, and having little reference to the common law either in its origin, or as furnishing the rule of interpretation.

FOREIGN JUDGMENTS AND CONTRACTS.

Q. 16. In suits upon these, would the American courts feel themselves at liberty to go into the merits, or merely receive the judgment as evidence of the debt?

A. A foreign judgment, when brought *directly* in question between the same parties, has the same conclusive effect as by the law of England. The judgments and decrees of foreign courts of competent jurisdiction have also, in general, the same effect, when brought *collaterally* in question (*Cranch's Rep.* Vol. iv. p. 434.)

Crondson v. Leonard. Wheaton's Rep. Vol. iii. p. 246. Hoyt v. Gelston.) So also the judgments of foreign courts of Prize, and other tribunals proceeding *in rem*, are received as conclusive of *the title of property in the thing*; but the question, how far a sentence of condemnation in a foreign court of admiralty should be considered as falsifying the warranty of neutrality, contained in a policy of insurance, has been much discussed in our courts. The supreme court of the United States adopts the English rule on the subject (*Cranch's Rep. Vol. iv. p. 436. Crondson v. Leonard.*). The courts of New York have rejected it; and the legislature of Pennsylvania has expressly provided against it by statute.

Q. 17. When foreign law is quoted in the courts here in support or avoidance of a foreign contract or obligation, how far do the judges consider themselves bound to notice it, or give it effect?

A. The rule of evidence as to foreign laws is precisely the same as in England. They are to be proved as facts: written laws, by the evidence appropriate to the proof of foreign public documents, and laws which have not been reduced to a written text, by the testimony of persons skilled in the laws of the foreign country.

ABSENTEES.

Q. 18. In suits against persons out of the jurisdiction, what is the mode of proceeding with respect to notice, or otherwise, and can a suit be brought against a transient person after he has left the country by any fiction of law as to notice, so as to affect his property here instead of suing him in his own fixed domicile?

A. Most of the states of the Union have *attachment laws*, by which proceedings may be commenced against absent persons having all the effects of a suit. Different periods and forms of notice are provided, to enable the party to come in and dissolve the attachment by giving bail to the suit. In general, the attachment is for the exclusive benefit of the creditor who makes it; but by the law of New York it is for the benefit of all the creditors, trustees being appointed who take possession of the absent debtor's effects for distribution among all his creditors, *pro rata*, unless he returns within a year and discharges his debts.

A voluntary assignment made by the debtor for the benefit of a particular creditor, or class of creditors, will operate a transfer of his property wherever situate in the Union; and if prior in date, and duly notified, will overreach an attachment made under the laws of the state where the property lies.

WILLS.

Q. 19. Does a will executed abroad according to the forms of the place where it is dated, carry personal property here; and in

case of intestacy abroad, would the law of the place where the party happened to die, or be last domiciled, prevail as to the mode of distributing his personal property?

A. A last will and testament executed abroad, according to the law of the place where it is made, will carry personal property in the United States; but it must receive probate there in the proper court having jurisdiction of testamentary matters, before it can be made the foundation of a suit for a legacy; and this even where by the foreign law the will requires no probate. (*Wheaton's Report*, Vol. xii. p. 169, *Armstrong v. Lear*). The executor named in the foreign will cannot act in the United States, until authorised by an appointment as administrator with the will annexed. Foreign letters of administration are not regarded.

The law of the place where the party happens to die, or to be last domiciled, prevails as to the mode of distributing his personal property.

POWERS.

Q. 20. Are powers or deeds duly executed abroad, according to the forms of the place, valid here, or are there any special regulations on this head in the laws of registry of the several states of the Union?

A. Powers or deeds relating to personal rights or personal property, duly executed abroad according to the forms of the place, are valid in the United States. But powers or deeds relating to real property in the United States must be executed according to the laws of that state where the property lies. These are various in their details, but in general the deed must be acknowledged before some judge or magistrate, before it can be admitted to registry. The laws of some of the states provide for an acknowledgment before the Lord Mayor of London, or Minister of the United States residing in London, or Lord Provost of Edinburgh, in the case of persons executing deeds in Great Britain. Such is the law of New York.

Q. 21. Is it necessary that the power by an absentee or foreigner to execute or acknowledge the deed or instrument here, be inserted within and made part of the deed itself; or may it be by a separate instrument?

A. It is not necessary that the power should be inserted in, or annexed to the deed; but a power to execute a deed must be under seal, according to the well known technical rule of the law of England.

MARRIAGES AND DIVORCE.

Q. 22. Would a marriage in Scotland, or any other country, where it has the effect of legitimating the children born before

such marriage, have that effect here, should the parties afterwards come to reside in these states?

A. I am inclined to answer this query in the affirmative, on general principles; but I am not aware of any judicial decision in America bearing directly on the question.

Q. 23. Could the courts in this country dissolve a marriage legally contracted in another, and, *vice versâ*, would the courts of this country notice a divorce obtained abroad of a marriage duly celebrated here between two of their own citizens?

A. The courts in the United States are in the habit of dissolving marriages contracted in foreign countries; but in some of the states a residence of considerable length is required to constitute a domicile for the purpose of suing for a divorce. Our courts would, as I conceive, notice and give effect to a divorce, obtained abroad, of a marriage duly celebrated in the United States, between our own citizens, or others, upon the same principles and with the same restrictions as respect the conclusiveness of other foreign sentences.

MINORS.

Q. 24. Would a native of Holland, who is not of age before twenty-five, be held liable for contracts entered into by him here without the authority of his guardian under that age, and would there be any difference in this case with respect to the *bona* or *mala fides* of the transaction on either side?

A. The answer to this query must depend on general principles of international law. The question would, as I conceive, be determined at Washington precisely as at Westminster.

SLAVES.

Q. 25. Would the circumstance of a slave coming as a domestic servant with his master to one of the non-slave-holding states here render him thereby free, *ipso facto*, and without process, or what would be its effect?

Q. 26. Supposing an American citizen of a slave-holding-state to take a slave with him to England or to one of the non-slave holding states of the Union as a domestic, would the party by voluntarily returning with his master to his domicile resort to his original state of slavery, or what would be the effect? and what would be the consequence of the slave's fleeing to a free state from a slave-holding-state? Would the former be bound to restore him on application?

As. to Qs. 25 and 26. If a person removing into a state where slavery is prohibited, *animo manendi*, carry his slave with him, the slave becomes free so long as he remains in that state. But a voluntary return of the negro with his master to his original

domicile in the slave-holding-state, would probably be *there* considered as reviving his former condition.

The constitution and laws of the Union secure to the owners of slaves in the slave-holding-states, when they abscond into the other states, the privilege of reclaiming them by judicial process. The same privilege extends to the case of a slave-owner travelling with his domestics into the other states *animo redeundi*.

Q. 27. In questions respecting freedom in the slave-holding-states, is the Roman law of manumission, or the English law of villenage, followed in judicial proceedings thereon, or what other mode of proceeding, and in interpreting the law do the judges follow the principle of *favendum est libertati*?

Can a slave by any act or mode of proceeding be manumitted out of his owner's domicile?

A. The rule of *partus sequitur ventrem* is adopted: and I believe the analogies of the English law of villenage, rather than the Roman law, are followed on this subject. But I speak with the less confidence because I am not familiar with the practice in the slave-holding-states. The mode of proceeding is by what is called a *Petition of Freedom*, and the trial is by jury under the direction of the court as to the law. There is no reason to doubt the impartiality of our courts and juries on questions of this sort.

Q. 28. Does the circumstance of colour operate as a presumption against liberty in a slave-holding-state?

A. The circumstance of colour does, I believe, operate in the slave-holding-states, as a presumption against liberty, but it is a presumption which readily yields to contrary proof.

Q. 29. Is the evidence of negroes and persons of colour, admissible in your courts of justice under any and what restrictions?

A. In the non-slave-holding-states, the evidence of persons of colour is admissible. In the slave-holding-states, it is, I believe, universally rejected as against white persons.

Q. 30. Is this evidence, when admissible, found to be in general worthy of credit, and in what degree?

A. This query will be answered under No. 32.

Q. 31. Do the courts of the several states in such cases lean to admit the competency of the party, and to throw the objections upon his credibility, or how otherwise?

A. Our courts, in all cases, lean against objections to the competency, leaving them to have their proper weight as to credibility. But, in general, the English law of evidence is adopted in our practice.

Q. 32. Is the evidence of negroes, and persons of colour in general, entitled to less weight than that of white persons of the same condition in life, and if so, do you attribute such difference:

A. My experience on this subject is confined to the non-slaveholding-states. I think the evidence of persons of colour is entitled to neither more nor less weight than that of other persons in the same condition of life; but it must be admitted that the social and moral condition of the free people of colour is in a very low state. A large proportion of the persons convicted of crimes are of that class, and though efforts have not been wanting on the part of the benevolent to give them the advantages of education and religious instruction, they still remain a degraded caste, with the indelible marks of a distinct race impressed upon them, which as it prevents the complete union of the two races, must ever present a barrier to their being raised to an equality in the social state with the whites. The emancipation of the slave in ancient Europe, and of the feudal vassal in the middle ages required but a single effort to place them on a level with their former masters. But in America, physical distinctions and irresistible feelings of antipathy founded upon them, are more powerful than the laws which pronounce them free and entitled to an equality of civil privileges. It is for this reason that the efforts of humane individuals, and of the government, have been directed to the removal of the race back to the continent from which they were originally transported. But there are formidable obstacles to this scheme of colonization, and it remains yet to be seen whether they can be surmounted. Whatever may be the result of this attempt, the people of the United States do not merit the reproach of having done nothing to efface the stain of slavery and its consequences, entailed upon them by the improvidence of their ancestors, and the commercial policy of the mother country. The colonial assemblies, at a very early period, passed bills for prohibiting the further importation of Africans, *which were negatived by the crown*. After the establishment of the present federal government, Congress passed laws forbidding our citizens from engaging in the foreign slave trade, which were very soon followed by a total prohibition of the importation of slaves into every part of the union. Indeed, Denmark is the only power which can claim the honour of having preceded us in the abolition of this traffic. The constitution of our national government has left the question of emancipation entirely to the local legislatures of the several states, nor has it been overlooked by them, since slavery is already abolished in a majority of the states where it formerly existed under the colonial government. In the extreme southern and southwestern states, the subject is embarrassed with the same difficulties as in your own West India colonies, and you are too well acquainted with the nature of these, not to appreciate their magnitude.

MISCELLANEOUS.

Q. 33. Are Masters in Chancery in this country restricted from acting as solicitors or counsellors, and obliged to take their references in rotation?

A. Masters in Chancery are, in general, prohibited from practising as solicitors.

Q. 34. Do you consider the entire abolition of fees in judicial offices as salutary, or with some restrictions?

A. I think a fixed salary, paid by the government, is the most proper mode of compensating judges. But where the fees can be so regulated as not by possibility to influence the conduct of the judge, it may, under certain circumstances, be found the most convenient mode of compensating judicial officers. The judges of our superior courts, both of the states and of the Union, are compensated by fixed salaries. But Masters in Chancery, Commissioners of Insolvents, and the class of judges who are authorised to make such interlocutory orders, as are usually made by a judge at chambers in England, are compensated for their services by fees paid by the parties. This is also the case with Commissioners, Notaries, Sheriffs, and other ministerial officers connected with the administration of justice. The judges of the courts having jurisdiction of testamentary matters, and of intestates' estates, are compensated in the same mode.

Q. 35. Are the usury laws, or laws limiting the rate of interest, considered as salutary or beneficial in the United States?

A. The policy of the usury laws is exploded with us, so far as respects enlightened opinion. But the laws are still in force in most of the states of the Union, and every attempt to repeal or modify them is encountered by strong opposition.

Q. 36. Has the tread-mill been generally adopted as a mode of punishment in the states, and has it been found efficacious?

A. The tread-mill has been adopted in some of the states, but I am not enabled to speak with accuracy as to the general results of our experience on the subject.

Q. 37. How far has the penitentiary system been adopted, and found to answer?

A. The penitentiary system has been adopted in most of the states, and I think the general result of our experience respecting it is far from being so discouraging as some have represented. I believe that in the instances where the anticipations of its friends have not been fulfilled to the utmost, it has been owing to errors in the construction and practical administration of the prisons; or from too sanguine expectations of what can be accomplished by human legislation, and which of course must always be attended with disappointment. Some information as to the defects in the construction and management of the present prisons, and the

measures proposed to be taken to correct them, will be found in the "First Report of the Prison-Discipline Society, Boston," published in 1826; in a report of the commissioners appointed by the legislature of New York, to visit the state prisons, January 15, 1825; and in a pamphlet, published in 1826, by Mr. G. Powers, entitled "A brief Account of the New York State Prison, at Auburn." Mr. Livingston has also prepared a code of prison discipline for the state of Louisiana.

Q. 38. Do you conceive the English system of punishment by arithmetical proportion, as by making grand and petty larceny differ only in the degree of value, or that of geometrical proportion, which estimates crime by a moral scale, better adapted for the purposes of distributive justice?

A. I think the distinction between grand and petty larceny is not adapted to promote the ends of justice, and that it ought to be taken away. I am very glad to find that this has been done by Mr. Peel's bill, at the late session of parliament.

Q. 39. Is the crime of forgery of frequent occurrence in the United States, and do you consider the punishment of death as the most efficacious to check it?

A. The crime of forgery and other offences against the rights of property, are not so frequent in America as in England. But the great multiplication of paper currency in the United States has been attended with a correspondent increase of the crime of forgery. It is never punished with death; but the query, whether that punishment would be found more efficacious than those now inflicted involves the general question, so much discussed among the writers on penal legislation, as to the punishment of death.

Q. 40. Do you consider it an advantage to have distinct courts of equity, instead of leaving to the common law judges the power of an equitable consideration in certain cases, not provided for by the common law?

A. I do not consider it an advantage *per se*, to separate the courts of equity from those of law. But where the division of the two tribunals has existed for a long time, and a distinct system of equity has ripened into a code, and become a rule of property, greater inconveniences than advantages would probably follow from investing the courts of law with equity jurisdiction. This question was much considered in the convention of New York, in 1821, and the result of the discussion was to continue the Court of Chancery upon its ancient footing, giving to the circuit courts a concurrent jurisdiction, subject to an appeal to the Chancery, in order to preserve the uniformity of the system. But this regulation has not much, if at all, diminished the business of the Court of Chancery, the most important suits being still brought there originally, and the increased population, wealth, and trade of the state occasioning a proportionate increase of litigation.

ART. VII.—EQUITABLE JURISDICTION.

A History of the Court of Chancery, with Practical Remarks on the recent Commission, Report, and Evidence, and on the Means of improving the Administration of Justice in the English Courts of Equity. By Joseph Parkes. Longman and Co. In one vol. 8vo.

THAT active spirit of litigation which prevails in this country is the common, perhaps the necessary, consequence of a redundant and busy population, and of extensive commercial relations. There are few men in our days who can say with the incomparable egotist, "downright Montaigne," "I have too much prevailed by my endeavours—in a happy hour I may speak it—that I am to this day a virgin from all suits of law." To put an end to the practice of litigation seems, if it can be achieved at all, to be rather fitted for the tardy labours of the moralists who seek the general improvement of the human race; but, to prevent that practice from becoming a curse to the community is a task of a different description, and belongs to the legislature. A bad system of laws, or a corrupt administration of any system of laws, are the means by which the evils of litigation become intolerable. Of the two, the latter is infinitely more mischievous, because it is of much greater extent, of more minute and subtle character, acting always most perniciously upon the interest and happiness of individuals, but never directing its attacks so openly against any particular public principle or public interest as to excite that kind of universal opposition which would destroy it at one blow. In the present state of the civilised world, whatever may be the relative merits of the codes of different nations, they must, in order to be endured, all be bottomed upon those principles of universal justice which never change. Although, therefore, a system should be wanting in that regularity and perspicuity which are properly considered to be essential to the formation of a perfect code, it may be such as, if rightly administered, will effect the great end of all codes—the security of the property and civil rights of the people who live under it. On the other hand, a mal-administration of justice, under however perfect a system of laws, may be made the means of great oppression on the part of the government, and most ruinous and tormenting in its effect upon the people. Expense and delay are the primary ills of a bad administration of law; by their influence justice itself may be done in such a manner as to make it a cleaving curse to all who invoke it; and of the three means of oppressing the people, provided

against by Magna Charta, the *deferring* of justice is the worst. (a)

In England we are not put to the hard necessity of deciding between the comparative evils of a bad system and a bad administration of law; for it is our fate to have the worst of both in extraordinary perfection. That branch of our jurisprudence which is called equity is sufficiently faulty in itself; but the administration of it combines the qualities of feebleness, expense, and delay, to a degree which has no parallel. Complaints, loud, and deep, and universal, have been made until the language of complaint is exhausted, and the victims have acquired an insensibility to their own and their fellows' sufferings. The Court of Chancery has become a place of torment to those who are in it, and a terror to all besides. The appalling inscription which the Italian poet read over the gate leading to the infernal regions, might be justly enough transferred to that part of Westminster-Hall in which the decrees of the Chancery are uttered:—

“ Per me si va nella città dolente :
Per me si va nell' eterno dolore :
Per me si va tra la perduta gente ” (b).

Any man who thinks upon the subject at all, must wonder that such a system could have grown to its present height in this country, where so many and such desperate struggles have been made to secure the advantages of freedom, among which a due administration of equal laws stands foremost. That it should have been allowed so long to prevail, that it should still be permitted to continue, gives birth to reflections of a very different description. That it should have now, that it should always have had, its partisans, excites no astonishment, for the rankness of corruption is captivating enough always to allure the unclean animals that fatten upon it, and where the quarry lies there will the carrion birds be.

The advocates of this system have been taught that to deny the necessity of reform is in vain. The failure of their attempts in that respect has now convinced them that its errors and vices become more apparent and more odious by every effort to palliate or to justify them. The expediency of a reform in laws which

(a) The superior importance of the laws which regulate the administration of justice is very forcibly pointed out by M. Meyer in the introduction to his able work entitled, “ *Esprit Origine et Progres des Institutions Judiciaires des principaux Pays de l'Europe.* ”

(b) Here, indeed, the quotation must stop, for it would be most unjust towards the system of English equity to make it say:—
Giustizia mosse 'l mio alto fattore :
Fecemi la divina potestate,
La somma sapienza, e' l primo amore.

time or other circumstances may have rendered inapplicable to the existing wants of a people is much too apparent, too obviously sanctioned by common sense and the homeliest reason, as well by the authority of the wisest and most profound thinkers on the subject to be now impugned. In the days of Lord Bacon a thorough alteration of the system of English law was contemplated, and Locke, in forming his constitution for Carolina, provided that the laws should be in force for only one century, at the end of which period they should be revised and adapted to what might then be the condition and wants of the state. (c) Reduced, therefore, from an open to an insidious and covert opposition, the partisans of corruption are not less eager nor less active in their efforts. They know that their main hope rests in delay, and to effect this is therefore their first aim. By propositions, which mean nothing; by concessions, which yield nothing; and by repeated promises and procrastinations, they calculate upon tiring out all who undertake the laborious and thankless office of correcting evils and improving a system upon which the happiness and tranquillity of the community so much depend. Every postponement is so much a triumph with them, that they sometimes utter their exultation aloud. But they reckon neither wisely nor well; they shout too soon. Delay fatigues, but it does not defeat—the spirit is raised which their howling cannot lay—and the work has been so well begun and carried so far that it cannot fail of being accomplished. The recent alterations in other branches of the law, and the liberal spirit in which they have been effected, proves that the bigoted and superstitious reverence for institutions, which have nothing but their rust and ruins to recommend them, has mainly abated. The outworks of the place have been carried, and, although the strong hold of corruption and error seems to defy attack, its foundations are sapped, and before repeated and earnest attacks it must fall.

The more effective and important of the means by which so desirable an object is to be accomplished, is publicity. Discussion in places where discussion can do good, and publicity every where, must ultimately prevail. It can never be a matter of choice with the public, whether they will or will not endure a bad system or an evil administration of law; let the fact be once made suffi-

(c) I migliori codici possono dunque avere le loro vicende. Quell'istessi leggi, che hanno prodotta la grandezza e l'opulenza d'un popolo, possono essere inefficaci a conservarlo in questo stato. * * * Bisogna distinguere che qualche volta il difetto è nelle parti, qual-

che volta nel tutto. Qualche volta dunque basta riparare l'antica legislazione, qualche volta bisogna mutarla interamente. La prima di queste intraprese non è molto difficile. Ma quanti ostacolis' incontrano nella seconda. *Filangieri. lib. i. cap. vi.*

ciently apparent, once forced upon their attention with such proof as should accompany it, and the remedy will not be far behind. Much has been done in this respect, much, it is true, remains to be done, but much is also daily doing. It would be as vain to attempt to check the flowing of the ocean, as to stop the progress of inquiry into the evils of the Court of Chancery, and they who are interested (and who is not interested?) in wishing that the evil system which now prevails should be abolished must rejoice at seeing that the mass is quickened, and that information is poured out from sources whence it was least expected.

The Report published by the Chancery Commission has done immense good in this respect, and infinitely more than its contrivers intended it should do. Unfairly as it was conducted, inefficient as it was in itself to compass any really good and useful purpose, it has laid the ground and furnished materials for reform which could hardly have been obtained by any other means—certainly by none so effectual. The Appendix of Evidence presents the most valuable and convincing testimony of the nature and extent of the evils which have grown up in and around the pernicious system to which it relates. That evidence is as various in its nature as it is extraordinary in its result. Some of the persons examined were able, honest, and intelligent; some stupid, and reluctant even to tell the little they did know; and others cunning and disposed to misrepresent or suppress the truth. But whether competent or not, willing or unwilling, such a body of information has been got from them, as places the necessity for reform in a more striking and undeniable position than it ever before assumed, at the same time that the means of effecting that reform are clearly pointed out. The assertions that facts were misrepresented, that the charges against the Court of Chancery were mere “inventions of the enemy,” are silenced for ever. The body of persons giving evidence are too numerous to have conspired: their opinions and feelings are so discordant that they could never have united for any common purpose; and yet they all, from the Masters to the Masters’ clerks—“the little dogs and all,” combine to prove that the Court of Chancery, as it exists, is a more pestilent annoyance than ever, since the days of the Star Chamber, has affected the interests, and affronted the common sense, of the people of England.

The discussions in the House of Commons have also done much towards reform. People in the House, and out of it, have begun to look upon the subject in its proper light. The House is pledged to some efficient reform. Lord Lyndhurst has publicly bound himself by a solemn promise, to bring forward a plan which shall secure the regular, faithful, and accurate performance of the business of his office. This promise, too, was given upon an occa-

sion of such importance, and in terms so earnest and emphatic, that his Lordship has made it a condition, for the performance of which his reputation is engaged.

There is, therefore, no cause for apprehending that the subject may be forgotten, or that the ingenious advocates for the existing abuses, will succeed in perpetuating them. Unless the pledge just alluded to shall be boldly violated, (which we do not fear) or unless there can be invented some means of rasing out of the minds of men that catalogue of odious and intolerable evils which the Chancery Report has dragged into day, (and this is impossible) some improvement must be effected. We have another and not less stedfast ground for the belief which is in us; and this is, that the literature of the country is engaged in effecting the same important object. Against the diffusion of knowledge no abuses can ever stand; the times are gone by in which craft or violence exercised an unchecked influence over states, and the battle must now be fought on fairer terms, and with weapons which are more accessible to all hands.

This conviction induces us to hail with great satisfaction the attempts which are made by men of talent and information to expose the real nature of a system to which no expressions but those of unqualified reprobation can be justly applied. Among these stands foremost the subject of our present article, "The History of the Court of Chancery," by Mr. Parkes.

The best method of effecting a reform is obviously by tracing up to its source the origin of the evil which it is proposed to cure. Without this, they who doubt are left unconvinced; they who are ill-disposed have a means of defence, or at least of objection, put into their hands. In a subject so obscure, and of so remote a date, as that of the jurisdiction of the Court of Chancery, this necessity may, however, lead to inconvenience. The temptation of being drawn into antiquarian details, which, although interesting as matters of history, prove little to the purpose, is so great that few men can resist it, and for this reason it is that many of the works which have hitherto appeared with a purpose similar to that now before us have fallen short of their aim, and that has evaporated in unprofitable disquisition which was undertaken with a view to immediate and useful improvement. Mr. Parkes has avoided this error very judiciously. His work shows that he has spared no pains in making himself acquainted with the earliest steps by which the power of the Chancellor arrived at its present elevation; but he has merely indicated, without dwelling upon theories; and having pointed out the sources whence knowledge on this subject may be readily derived by those who choose to seek it; he goes onward to that which it is his great purpose to prove, that, at a very early period after its institution, the Court, and the

practice of the Court, were felt to be most burthensome evils, complained of by every body, and openly testified against by all who had the ability and the opportunity of giving effect to their censures.

The existence of the Court of Chancery in this country is in itself a wonder. No similar institution exists in any of the neighbouring nations; and yet it is clear that in every community there must be some means of administering justice in cases where the law is silent, or where the strict rule which it prescribes would not aptly apply. In other countries the civil law, which has a forcible resemblance in many respects to our equity law, is called in to supply the deficiencies of municipal or common law. This was the less practicable always in England for two reasons: first, from the hatred and jealousy which the people felt of the civil law—the favourite study of the ecclesiastics, and, as they would have made it, if they had not been checked, a most formidable means of increasing their power; and, secondly, the impracticability of engrafting its decrees upon a system, the distinguishing feature of which was the trial by jury. The latter difficulty was not experienced in any other country; because no other country was at the period we allude to blessed with an institution, “the like whereof,” to use the quaint language of Lord Coke, “the whole Christian world hath not.” Blackstone says, that the harsh or imperfect judgments given by the common law courts, rendered applications for redress necessary, which were made to the King and his council, “and they were wont to refer the matter either to the Chancellor and a select committee, or by degrees to the Chancellor only, who mitigated the severity, or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case.” Other writers who have felt less partiality for the judicial institutions of the country, and were less dazzled by the notions of perfection which that accomplished jurist entertained of English law, have taken a different view of the subject, and have traced the origin of the equitable jurisdiction to that desire, which, if not natural, is so universal as to appear natural, and which urges kings to extend their prerogative by means of encroachment on the people’s rights.

It matters little which of these notions shall be adopted, although we confess that, in our opinion, reason and the evidence of history are both strongly in favour of the latter. It is enough to know as an historical fact, that the Court of Chancery is an indigenous plant in this land; that its rankness and venom have been felt and complained of for several centuries; but that all attempts to eradicate it or to bring it into wholesome cultivation have hitherto failed.

As early as the 5th Richard 2, the Commons petitioned that

the most wise man in the realm might be made Chancellor, and "that he seek to redress *the enormities of the Chancery*." So strong was the language which the mal-administration of the Court had excited at that early period. From thence it continued, if not to grow worse, to exhibit no symptoms of amendment until the almost fabulous times of Sir Thomas More, who is said to have administered justice equitably and promptly. One's utmost faith is taxed to believe the wonderful tales told of this Chancellor; if they be true, they would still seem to be out of the ordinary course of nature, and to have come to pass by a peculiar interposition of Providence, which at the same time that it inflicted upon the nation one of the worst Kings the world ever saw, bestowed upon it a Chancellor such as the world will never see again.

Mr. Parkes traces with most satisfactory accuracy the various complaints, and efforts at amendment which were made in the reigns preceding that in which Charles I. lost his life and his crown in an attempt to crush the liberties of his people. Before, however, we reach that period, we must pause a moment to extract the statement of Mr. Wraynham, who was prosecuted in the Star-Chamber for having accused Lord Bacon of bribery. The King had refused to reverse a judgment which Wraynham complained against, unless the Chancellor was charged with bribery, and the miserable petitioner, urged by his wrongs and justified by the conduct of the Chancellor, wrote a bitter accusation of him. The following, which Mr. Parkes justly calls an affecting narrative, is extracted from his defence, and exposes some of the then evils of the Court of Chancery:—

"In making whereof (the book) I mustered together all my miseries; I saw my land taken away; which had been before established unto me; and after sixty-four orders, and twelve reports, made in the cause; nay, after motions, hearings, and re-hearings, fourscore in number, I beheld all overthrown without a new bill preferred. I discerned the representation of a prison gaping for me, in which I must from thenceforth spend all the days of my life without release: for in this suit I have spent almost 3,000*l*.; and many of my friends were engaged for me, some damnified, others undone; and with this did accompany many eminent miseries, likely to ensue upon me, my wife, and four children, the eldest of which being five years old; so that we, that did every day formerly give bread to others, must now beg bread of others, or else starve, which is the miserabest of all deaths: and there was no means to move his Majesty to hear the cause, but to accuse his Lordship of his injustice; this and all these moved me to be sharp and bitter, and to use words though dangerous in themselves yet I hope pardonable in such extremities."

Neither the too distinct proof of Lord Bacon's corrupt administration of justice, nor that more honourable and earnest endeavour to amend the laws by which he sought to atone for his culpability, effected any change, and the mischiefs of the Chancery

system continued in unchecked vigour until the Parliament undertook the task of reform.

That part of the work in which the author details the attempts made during the time of the Commonwealth to accomplish this most desirable end, is one of the most interesting and valuable parts of the work. It is a topic which has been much neglected by our best historians, who, perhaps for want of legal knowledge, and more probably misled by their prejudices against an assembly in which many weak and wicked actions were perpetrated, have pronounced against them the too hasty censure of never having done or intended to do any good ones. As this part of his task is extremely well performed, so it is one of the most difficult that the author has had to encounter. The materials for it lay scattered wide and far. The uncertain and questionable authority of party statements, of tracts written upon the spur of the occasion, and of the public documents by which truth is sometimes polluted in its very source, were all to be consulted and to be verified before any safe conclusion could be drawn from them. The ungrateful nature of the subject and the scantiness of the visible result from so much labour might have deterred a less energetic searcher after the truth; but Mr. Parkes has succeeded admirably in his attempt, and has the credit of being the first person who has thrown a satisfactory light upon a very interesting part of our domestic history.

One of the first things performed by the Commons after they were in a situation to turn their thoughts to the reform of the internal government of the nation, appears to have been the alteration and amendment of the laws generally, and particularly the making new rules for reformation of the proceedings in Chancery. This was speedily followed by the appointment of a Committee to carry the same objects into effect, on which committee all the law officers and the rest of the members of the long robe were enjoined to give their constant attendance. For a period of three years following this subject seems to have occupied the attention of the Parliament almost unremittingly. The titles of the bills which were prepared for this purpose, show the intelligence as well as the zeal with which they had set about their task. They comprise all the important heads of jurisprudence respecting which reform had become necessary, and were as follow:—

- “ 1. For taking away Fines upon Bills, Declarations, and Original Writs.
2. An Act touching Marriages and the Registering thereof, and also touching Births and Burials.
3. An Act against Customary Oaths.
4. For taking away Common Recoveries, and the unnecessary Charge of Fines, and to pass and charge Lands entailed as Lands in Fee-simple.
5. For ascertaining of Arbitrary Fines upon Descent and Alienation of Copy-holds of Inheritance.

6. For the more speedy Recovery of Rents.
7. For the better regulating of Pleadings and their Fees.
8. For the more speedy and easy Recovery of Debts and Damages not exceeding the sum of Four Pounds.
9. For the further Declaration and Prevention of Fraudulent Contracts and Conveyances.
10. Against the Sale of Offices.
11. For the Recovery of Debts owing by Corporations.
12. Against Challenges, Duels, and all Provocations whatever.
13. To make Debts assignable.
14. To prevent Solicitation of Judges, Bribery, Extortion, Charge of Motions, and for Restriction of Pleadings.
15. For the better putting in Execution the Laws *contra Bonos Mores*.
16. For County Registers, Wills, and Administrators; and for preventing Inconvenience, Delay, Charge, and Irregularity, in Chancery and Common Law, (as well in Common Pleas as criminal and capital Causes,) and for settling County Judicatures, Guardians of Orphans, Courts of Appeal, County Treasures, and Work-houses, with Tables of Fees and short forms of Declarations.

"Such," the author continues, "were the magnificent objects and invaluable labours of the Committee in a period not exceeding *three* years; and such the brevity and wisdom of their intended statutes, all the detail of which is comprised in one hundred and twenty quarto pages! It is well observed by Oldmixon that 'the very title of these acts shows how worthy they were of the wisdom of the nation, and it is astonishing that the same art which obstructed the reform of the practice of the law, almost fourscore years ago, should have still succeeded in the like obstruction from that time to this (1730). It does by no means do honour to the profession which is charged with it.'"

A measure appears to have been soon afterwards in contemplation respecting the origin and proceeding in which there is considerable obscurity. Whitelocke says there was a debate which lasted two days, in August 1653, on the subject of the Court of Chancery, but does not report the arguments. The debate terminated, however, with a vote which, it must be admitted, laid the axe to the very root of the evil, for it was, "That the High Court of Chancery be taken away, and that a Bill be brought in for that purpose." The ultimate fate of this very bold measure is thus detailed:—

"On the 19th of October, 1683, a Bill was reported from the Committee of the Law and read a second time, for the abolition of the Court and the appointment of Commissioners for hearing the existing and future causes. On the 22d, it underwent some amendments in committee, and again on the 3d of November. The suicidal dissolution of the Parliament on the 19th of December following, blighted the hopes of the country which had anxiously viewed with high expectation these sound and well directed plans of legal reform. One member, before the removal of the mace, in a bitter invective against that audacious dissolution, deplored the approaching destruction of a parliament, when the committee for regulating the law had ready to be offered to the House several bills of very great concernment to the good and ease of the people. Such was the premature end of a parliament, which of course Clarendon belies, and Carte echoes Clarendon,

and Rapin terms it "a ridiculous assembly that did nothing worth remembering in a session of more than five months!" The unconstitutional and unjustifiable convention of it by Cromwell's warrant of nomination was a damning sin which the servile historians thought could never be atoned for: prejudice prevented their inquiring into, or induced them to conceal its important labours; they thought that no good could come out of Galilee, but subsequent parliaments in the adoption of many of the legislative principles and intended reforms of these republicans have more wisely acted on the motto—*Fas est et ab hoste doceri*.

It is not consistent with our present limits to follow the author in his progress, as he traces the history of the Court of Chancery down to the present time. The characters of the judges are drawn fairly, and with no disposition to exaggerate the odious points, or to make them weigh more heavily on their memories than mere justice requires. The frequent complaints against the Chancery, the ineffectual attempts to procure an improvement in its system, are concisely and correctly stated; the animadversions are just, and the observations acute and original. The author does not fall into the error, somewhat too common, of attributing to persons the evils which belong to the system. A remarkable instance of this is displayed in a sketch of the character of Lord Eldon, which, as it is a fair specimen of the style and tone of the work, we extract:—

"Lord Loughborough was succeeded by Lord Eldon, on the 14th of April, 1801, and, excepting the short intervening chancellorship of Lord Erskine from the 7th of February, 1806, to the 1st of April, 1807, he retained possession of the seals till within a few weeks of the publication of the present volume, May, 1827. When the sun of his judicial power and patronage is setting in the recent ministerial revolutions, it would be illiberal to treat his professional character with needless asperity, or to withhold the meed of praise so justly due to the industry, integrity, and *technical* knowledge of equity which peculiarly marked his long career in the Court of Chancery. It is to be regretted that the judicial failings of Lord Eldon have been magnified into the one great and original cause of the evils of the Court, which may give rise to a mistaken expectation that his retirement from office will of itself lead to the climax of its reformation. These pages demonstrate that the abuses attendant on the administration of English equity are of remote origin and progressive accumulation: that long before Lord Eldon was born they existed in an equal degree, compared with the relative quantum of litigation before the Court, and have merely been aggravated by his constitutional tendency to doubt and procrastinate. But although Lord Eldon is absolved from the moral responsibility attaching to the *source* of the abuses of his jurisdiction, he is deeply culpable in upholding and increasing them by a long-continued denial of their existence, and an unceasing opposition to their investigation and legislative removal. Since Lord Eldon's accession to the Chancellorship, the funds of the suitors in court have *doubled* in amount, and the real property involved has probably quadrupled. Many of the evils of his judicial reign have doubtless originated in the increase of litigation, arising out of the vast mercantile transactions of the nation. A country pre-eminently commercial, by the multitude and intricacy of its contracts, will engender

lawsuits in a far greater relative proportion than other states. It was, however, the duty of a judge of liberal and comprehensive mind, to have adapted his court to the new order of things; and so far from the antiquity of the abuses forming any valid justification of Lord Eldon's conduct, it should have been an additional motive for securing his attention to the improvement of his extended jurisdiction. But he invariably discountenanced every legislative inquiry and proposed reform. The political nightmare of *innovation* haunted his imagination: in his legal vocabulary, reformation and revolution were synonymous, and the latter word was another synonym for destruction. He belonged to the old school of Aristotelian lawyers, deeply versed in the fictions, subtilties, and procedure of English equity; and as a pedantic linguist conceives the acquisition of dead languages to be, not the means of acquiring knowledge, but knowledge itself, so Lord Eldon mistook the means for the end, the *forms* of justice for the *substance* of equity. Notoriously ignorant of, and by nature incapable of justly appreciating, the great principles of legislative science and jurisprudence, he superstitiously adhered to every thing *old* because it was ancient, and objected to the introduction of every thing modern because it was *new*. The progress of jurisprudence in other countries was not his study but his horror; and he would as soon have consented to introduce judicial improvements from abroad, as to admit foreign corn without duty. Perceiving what is obvious to every reflecting being, that hasty decisions in doubtful cases furnish incontrovertible proofs of weakness of mind, he yet failed to discover that to distrust that which is plain, and doubt that which is clear, is an equally convincing evidence of imbecility of intellect. He greatly resembled Coke; though he prided himself on his imagined similarity to a man of much greater mind, the "impeached revolutionist," Lord Somers.

There is one part of Mr. Parkes's book which is extremely amusing, and not without its value. He has drawn out a list of all the officers employed in the Court of Chancery, specifying the manner in which their services are remunerated, whether by fees of office, or by a fixed salary, and the total number seems to be rather more than three hundred. Volumes might be written upon the absurdity and wickedness of keeping up an institution so feeble and so expensive as this, but still they would only establish a general proposition which every body must assent to and no one would think of acting upon. Mr. Parkes's table shows the matter in all its ridiculous deformity; it displays at once the actual number, rank and file, of the cormorants who prey upon the suitors in Chancery. No one can doubt, after looking over this roll, almost as long as the Army List, and infinitely better paid, that the system in which it is permitted requires prompt and thorough alteration. The useless officers, who have hitherto been behind the scenes, known only to the initiated, come at once into glare and notoriety, and serve to explain some of the reasons why it is so difficult to purge the uncleanness of the institution. That difficulty is admitted to be very great; many an earnest and well-directed effort at reform has been baffled by the subordinate officers of the Court of Chancery. Their numbers, and

that power of tenacity, for which all vermin are remarkable, almost insure their safety; but to know where they lurk is a great point. This being ascertained, it is made clear that there is already a sufficient body of officers to do the intermediate business of the Court twice over, all that appears to be wanting is an addition to the number of judges that causes may be decided promptly, that the inert powers of the Court may be brought into activity, and that useless persons may be compelled to do that duty which they are too well paid for only pretending to do.

The remedial propositions of Mr. Parkes, though the most important part of his volume, involve a more considerate and lengthened criticism than we can devote in the present article. He traces the *variety* of the defects and abuses in *all* departments of the laws and legal institutions of the empire, and which, he contends, in the aggregate necessarily beget a great proportion of the grievances of the courts of equity. He proposes, therefore, for the review and amendment of the general system of English technical procedure and law, a commission (composed not only of lawyers but of intelligent persons conversant with the various worldly affairs, the objects of litigation) to investigate patiently and honestly the defects in, and means of improving, our general system of jurisprudence. The particular propositions for the substantial remedy of Chancery abuses, he suggests, are, a subdivision of the labour and jurisdiction of the courts of equity, and the substitution of *viva voce* for written evidence, not involving, however, the necessity or machinery of a jury. The present mode of evidence he considers a great and ultimate cause of Chancery evils, and one which has by no means had its just share of detection or exposure. The consideration of this grave subject we postpone till the legislative plans of reform, which *must* be introduced into the present session of parliament, are promulgated, and when we shall devote a distinct article to their exposition and review.

In the Appendix, Mr. Parkes has preserved the draft of an act "touching the Chancery," prepared by the Commonwealth Committee, together with some other documents connected with his work, among which is a curious letter from Lord Hardwicke to Lord Kames, on the principles of English equity. Upon the whole, the work is an extremely useful one: it conveys, in an agreeable form, exactly the sort of information which ought to be universally spread, and takes at once a just and a popular view of a subject which interests every one.

ART. VIII.—STATE OF CRIME IN ENGLAND AND FRANCE.

1. *Report of the Select Committee of the House of Commons, appointed to inquire into the cause of the Increase in the Number of Criminal Commitments and Convictions in England and Wales.* June 22, 1827.
2. *Compte Général de l'Administration de la Justice Criminelle en France, pendant l'Année 1825, présenté au Roi, par le Garde des Sceaux, &c.* Paris, De l'Imprimerie Royale, 1827.
3. *Compte Général de l'Administration de la Justice Criminelle en France, pendant l'Année 1826.* Paris, 1827.

UNTIL within a recent period, it was much the habit to regard crime in no other light than as a signal for the infliction of punishment. The perpetration of an offence called up no ideas in the mind but those of the gaol, the gallows, and their kindred horrors. Should the offence be one of frequent recurrence, the ready inference was, that the punishment fell short in point of severity: the magistrate must act with vigour, the law must put forth its strength. Few persons troubled themselves to inquire into the disproportion of offences at different periods and in different places; to mark the influence of accidental circumstances upon the amount and character of crime; to discriminate motives and impulses; or to trace the causes and progress of demoralisation. If more sheep were stolen in Kent than in Suffolk, it was ascribed to the pernicious lenity with which the offence had been treated in the former county: an example must be made; a hanging judge must be dispatched thither the next assizes. No wonder, then, that every attempt to relax the rigour of the law should have been resisted as a wild and extravagant speculation, and that the first criminal judge in the kingdom should have denounced the proposal, to abolish the punishment of death in the case of privately stealing to the value of five shillings, as an "experiment pregnant with danger to the security of property." (a)

(a) See Lords' Debates, May 30, 1810. The same noble lord, when the proposition was renewed in 1811, observed, that the "existing system of criminal law had stood the test of a century; that it had been the just boast of this country that its laws were wise and humanely administered; and that they ought not to

give way to the extravagant speculations of modern philosophy, which spurns the practical lessons of experience, and would raise the superstructure of every measure on the unstable basis of abstract theory." He remarked also, that Sir William Blackstone "was young and inexperienced when he published his opi-

Those times, and the political and legal maxims that were suited to them, have passed away; yet still, at intervals, something will start up, to remind us that such things were, and that our criminal code could once boast a splendid array of one hundred and sixty capital felonies. A portion of the old leaven is discoverable in the following passage from a paper on the Amendments of the Criminal Law in the last number of the *Quarterly Review*:—"We are aware of the many and multifarious causes to which the augmentation of crime may, in a great degree, be traced pretty accurately; but as long as we find such increase accompanying so extensive a reduction in the severity of punishments, we must consider it as a fact deserving of much consideration, and well-calculated to awaken the most serious inquiries into the connection between severe punishment and the repression of offences. We think it calls upon legislators to be cautious how they consider reduction of punishments, abstractedly viewed and per se, as matter for congratulation. We never can regard it as such, until we see clearly that, without these painful severities, the end of repressing crime is adequately effected." As if the legislature had proceeded in its legal reforms with indecent zeal, and eager unreflecting precipitation, and had not measured its steps with a degree of nervous circumspection almost approaching the ludicrous; as if it had abrogated a single penal law, or reduced the severity of a single punishment, except where the one and the other had been found by experience to defeat the ends of justice, and had been loudly and emphatically condemned by public opinion.

But this and the like solemn warnings are the hollow voices of departed spirits. The prevailing conviction of those who live and think for the present and the future is, that there exist other instruments for repressing crime besides rigorous punishment, other springs of criminal action besides confirmed depravity, other passions in the human mind besides fear; and that it would be more to the advantage of society to diminish the force of temptation, and to aid and strengthen the moral restraints, than to multiply or aggravate the physical. Among the many evidences of the existence and workings of this feeling are the interesting

nions." To which the Chancellor (Lord Eldon) added, that Blackstone's opinions on the Criminal Law, "as contained in his Commentaries, were to be regarded as the offspring of an eager, rather than a well-informed mind. I have, however," continued the Chancellor, "reason to believe, that after he had learned

to listen to those great teachers in political science, (experience and observation) his opinions underwent a considerable change, and that in the latter part of his life he saw the wisdom of the principles by which our Criminal Code is at present regulated.—*Lords' Debates, May 24, 1811.*

documents at the head of our paper. That which stands first, the Report of the Select Committee of the House of Commons, appears to have been framed under circumstances which preclude any very minute criticism. The Committee was appointed at too late a period of the session to allow of its collecting such a body of materials as would enable its members to take an accurate and comprehensive view of the subject proposed for their investigation, in all its momentous bearings and complicated relations. The Report, therefore, is rather to be considered as a fragment,—an earnest of future labours,—than any thing complete in itself. Scanty, however, as it is, there is sufficient to show that the Committee was in the right track, and actuated by the best disposition. The increase of crime, compared with that of the population is certainly most appalling. The population of England and Wales in 1801, was nearly nine millions; in 1821, nearly twelve millions; being an increase of little more than one-third in twenty years. The number of commitments for trial in 1806, was 4346; in 1826, it amounted to 16,147; almost a fourfold augmentation. Four causes are assigned in the Report for the increase of crime in the agricultural districts:—1. The low rate of wages, and want of sufficient employment for the labourer;—2. The mal-administration of the poor laws in general, and the mis-appropriation of the poor rates to eke out wages in particular;—3. The game laws, and the great increase of game-preserves;—and 4. The many recent acts, conferring upon magistrates the power of summary conviction. Upon the two first of these causes we shall at present only remark, that it would well become legislators to address themselves heartily and resolutely to the correction or counteraction of evils of such fearful and acknowledged magnitude, before they give ear to the suggestions of any who would persuade them that our statute-book is not sufficiently sanguinary. Of the game laws, and their operation, we have before expressed our opinions. (b) To a calm cool man—to one whose “blood is very snowbroth,” it might be a subject of bitterly amusing speculation, to calculate how long the interests of humanity and common policy, how long the peace and well-being of society, are to be sacrificed to the *sport* of landed proprietors.

With respect to the power of summary conviction, which has been so alarmingly extended by modern statutes,—by Mr. Peel's Acts amongst others,—we can readily believe, that the legislature, in conferring it, has been influenced by the purest and most humane motives; and it must be confessed that, if we could feel perfect confidence in the temper and discretion, the mental and moral qualifications of all those who are entrusted with this im-

(b) No. II. p. 253.

mense branch of jurisdiction, it might be exercised much to the benefit of the community. But it is, at the same time, a most dangerous power, and one that tempts its own abuse. Few persons can carry a drawn sword with the same quiescent and forbearing spirit that a trooper in the gateway of the Horse-guards exhibits; and there is much reason to doubt, whether even one of the quorum,

Who of his *Dedimus* possess,
As one with inspiration blest,
Enjoys the happiest transition
From ignorance to erudition,

is, notwithstanding these intuitive advantages, sufficiently disciplined for the purpose, or fully conscious of the virtue of seasonable inaction. Accordingly the law does not remain idle; and hundreds are with reckless indifference consigned to a gaol, by these "courts of record in themselves," for offences, which at the Assizes, or even at the Quarter Sessions, would only be visited with a slight fine or a reprimand. The consequences may easily be foreseen, and are well depicted in the following extract from the Report before us:—

"Your Committee would observe, that although petty offences ought not to go altogether unpunished, there can be no greater evil, than the abuse of the power of sending to prison for trifling trespasses: so far from preventing atrocious offences, your Committee is of opinion, that the mere fact of having been sent to prison is likely to deprive a man of one of the greatest moral restraints—the dread of being marked out as a criminal in the face of his country. To this evil is to be added the danger of associating with bad characters in prison, and the difficulty which sometimes occurs of finding employment after being discharged."

With these few remarks, we shall for the present take leave of the "Report," referring the reader for some highly interesting evidence to the paper itself, (c) and expressing our sincere hope, that the Committee may be empowered to resume its inquiries in the present session. We now proceed to the examination of the statements furnished by the French *Garde des Sceaux*, relative to the administration of criminal justice in France.

Two more important official documents have rarely issued from the bureau of a minister, than these records of crime,—admirable in general design, and executed with a degree of discrimination, and minute accuracy of detail, equally creditable to the talent and diligence of M. Peyronnet and his coadjutors. They present us with a complete view of the penal administration in France, during the years 1825 and 1826, in a series of synoptical tables, drawn up in every conceivable form and combination, which place

our own meagre Parliamentary Returns in a most contemptible light. As they are in the hands of very few persons, we imagine that we shall be rendering no unacceptable service to our readers by giving a short summary of their contents, followed by some of the tables of most general interest. That the plan of arrangement which pervades these official statements may be understood, it is necessary to premise, that offences in France are divided into three classes, cognizable by three distinct branches of jurisdiction. The first class comprehends all offences of deep malignity, which are designated *crimes* (*crimes*); these are tried by a jury in a Court of Assize, (*d*) (*Cour d'Assise*), and are subject to the heaviest punishments (*peines afflictives ou infamantes*), such as death, labour on the public works, imprisonment, pillory, &c. To the second class belong those of less magnitude, which in the forensic language are termed *délits*, delinquencies, are cognizable by the tribunals of correctional police, (*e*) and may be punished by imprisonment for a term not exceeding five years, by temporary privation of certain rights, and by fine. The last class comprises all minor offences, denominated *contraventions*, which are within the competence of the tribunals of simple police, or the *juges de paix*, whose authority is limited to the infliction of imprisonment for a term not exceeding five days, and a fine of from one to fifteen francs. Thus we have *crimes*, *delinquencies*, and *contraventions*, which naturally suggest a corresponding distribution of the penal tables before us. To these a fourth division is added in the *Compte Général* for 1826, containing a general survey of the progressive steps of the different tribunals in their judicial investigations, the duration of the proceedings, &c.

The first class of offences is distinguished into crimes against persons, and crimes against property.

In 1825, the number of persons charged with *crimes* before the courts of assize, was 7234; which, compared with the population of the whole kingdom, is at the rate of 1 for every 4,211 inhabitants. Compared with the population of the different departments, the proportion varies from 1 in 27,342, to 1 in 1001.

The number of accused in 1826 was 7591, being an actual increase of 357: compared with the entire population of the kingdom, it is as 1 to 4195. The proportion in the departments, for this year varies from 1 in 15,808, to 1 in 1230.

It is not a little remarkable, that the two departments which exhibit the largest proportion of crime are precisely those which

(d) In every department there is a Court of Assize, composed of a president and four other judges, and a jury of twelve "good men and true." The Court holds its sittings every three months, and tries all charges sent before it by that Section of the

Cour Royale which is called the *Chambre des Mises en Accusation*, and which performs in some degree the functions of our grand juries.

(e) The sittings of the Tribunals of Correctional Police are permanent.

may be said to represent the extreme points of civilization and rudeness in the kingdom; a result which would perplex the disciples of Rousseau, admirers of unsophisticated barbarism, no less than the advocates of refinement, his adversaries. In the department of the Seine, or Paris, the proportion of persons accused in 1825 was 1 in 1022; in 1826, 1 in 1230; in the department of Corsica, the proportion stated for the former year is 1 in 1001; for the latter, 1 in 1380. But the resemblance which thus exists between the two departments, with reference to the *amount* of crime, vanishes altogether when we view the *character* of the offences. In Paris, 90 out of 100 were prosecuted for offences against property; whereas, in Corsica, no less than 76 out of 100 were charged with crimes against the person. The ghost of Jean Jaques, however, will joy to hear that, of the two departments which stand distinguished in these tables, as presenting the smallest relative amount of crime in each year, the first (La Corréze) is marked by M. Dupin as one of the most backward in civilization; and that the second (La Creuse) also belongs to the southern division of France, which, in contradistinction to the intellectual light of the north, is denominated *France Obscure*.

The number of individuals charged with crimes against the person, in the whole kingdom, during the two years, compared with the aggregate of the accused, is 29 in 100.

Of the 7234 charged with crimes in 1825, and the 7591 in 1826, there were convicted, and condemned—

	1825.	1826.
To death	176	197
To perpetual hard labour in the public works } (<i>travaux forcés à perpétuité</i>)	351	353
To hard labour for a limited time (<i>travaux</i> } <i>forcés à temps</i>)	1271	1373
To reclusion (<i>f</i>) (<i>reclusion</i>)	1370	1427
To the pillory (<i>g</i>) (<i>carcan</i>)	6	3
To banishment	1	1
To civic degradation (<i>h</i>) (<i>dégradation civique</i>)	2	1
To imprisonment with or without fine	1359	1495
To detention in a house of correction for a } certain number of years (offenders under } the age of sixteen)	58	57
Total	4594	4910
Acquitted	2640	2681
	7234	7591

(*f*) For this and the two following notes see next page.

It appears then that the acquittals in 1815, for the whole kingdom, were 36 in 100; whilst, in 1826, they were only 35. But, in the departments, the deviations from this mean proportion are most extraordinary, especially in the tables for 1826. Thus, in one department (La Haute Loire,) out of 100 prosecuted, 78 were acquitted; 9 sentenced to suffer correctional punishment (*peines correctionnelles*), and only 13 to suffer infamous punishment (*peines infamantes*); that is, 13 only, out of every 100 accused, were convicted of the precise offences charged against them. On the other hand, in the *département de la Mayenne*, there were only 13 acquittals in 100 prosecutions.

So vast a disproportion, were it to continue for a succession of years, would unquestionably betoken either a most culpable degree of precipitation on the part of the public functionaries in some of the departments, in instituting or admitting charges, or a remissness equally inexcusable in the prosecution of them. But nothing decisive can be inferred from the experience of one, or even two years. The number of acquittals, as M. Peyronnet justly remarks, will depend much upon the nature of the crimes themselves, independently of any local or accidental circumstances; the difficulty of proof being infinitely greater in some cases than in others. Thus, to go no farther than the two grand divisions of crime, we find that, in prosecutions for offences against persons, in the whole kingdom, one-half were acquitted in 1825, and 49 in 100 in 1826; whereas, for offences against property, 31 in 100 were acquitted in the former year, and 33 in the latter.

Forty-eight tables in the *Compte Général* of 1825, and forty-seven in that of 1826, are devoted to the developement of the facts, of which we have given the above brief summary. The statement of 1826, however, is far more comprehensive and minute in its details than that of the preceding year. Twenty-six new tables are added to this first part, distinguishing the age and sex of the persons tried; the duration of the punishments; the number of persons prosecuted in their absence (*par contumace*), and of those subsequently arrested, and tried in the ordinary course; the judgments reversed, and the results of the new trials thereupon; the apparent motives of the capital crimes, and the instruments with which they were committed; the number of persons charged with a second offence, and of convicts, to whom the king granted letters of *rehabilitation*. One of these tables is altogether out of

(f) Imprisonment in a *maison de force*. The *maximum* of reclusion is ten years; the *minimum*, five.

(g) The *carcan*, besides being in itself a substantive punishment, is regularly superadded to the punish-

ments of *perpetual hard labour*, *temporary hard labour*, and *reclusion*.

(h) *Civic degradation* corresponds to that which is termed in our law *amittere liberam legem*.

its place, and would appear to have slipped in by accident, were it not that *M. le Garde des Sceaux* comments upon it in his Report—the account, namely, of the jurymen who absented themselves, with the causes of their absence. The appropriate place for this table is the fourth part, which relates to procedure.

With respect to the sex of the accused, the number of women appears to have been but one quarter of the number of men; in the aggregate of those tried by the Courts of Assize, only 18 in 100; and of those tried before the tribunals of Correctional Police, only 21 in 100 were females.

From the age of discretion up to thirty, there is a striking increase in the number of the accused of both sexes: from that period the number gradually diminishes; thus, it seems that 53 in 100, more than one-half of the entire number of the accused, were below the age of thirty. This result appears so strange to *M. Le Garde des Sceaux*, that he recommends an inquiry into the causes of the phenomenon, in order to combat their baneful influence. “*Lorsque ces tableaux,*” he observes, “*auront été dressés pendant plusieurs années, il sera utile de rechercher, pour les combattre, les causes qui excitent si puissamment au crime à un époque de la vie où toutes les ressources honnêtes semblent s’offrir d’elles-mêmes à ceux qui veulent en profiter.*”

One would imagine, that it required no very deep investigation, no tables but the table of human nature, to discover that temptation is stronger, and the power of resistance weaker in youth, and the danger of contagion from association tenfold; that youth is the period of daring and enterprise, whether for evil or good, sacrificing every thing to the present moment, reckless of consequences; and that the career of crime is often suitably terminated before thirty. *M. Peyronnet* may devise means for diminishing the gross amount of crime; but we augur that he will find some difficulty in destroying this proportion.

The table distinguishing the sex and age of the persons charged with crimes, with the four tables—two for each year—containing the general statement of crime throughout the kingdom, will be found appended to this paper.

Of the duration of punishments, it may be sufficient to remark, that, of 1,139 persons condemned to temporary hard labour in 1826, 467 were sentenced to the *minimum*, five years; and only 48 to the *maximum*, 20 years. The same moderation is observable in the application of the other temporary punishments.

Of 5,812 judgments pronounced by the Courts of Assize, in 1826, 1,151 were carried before the Court of Cassation, out of which number 74 alone were wholly or partially annulled.

The number of persons tried in 1826, who had been previously convicted of crimes, was 756. Of these 112 were acquitted; 18

condemned to death; and 64 to perpetual hard labour. The crime charged against the principal part of them was theft.

Five persons received letters of *rehabilitation* in 1826, after undergoing the legal penalties for their crimes: three of these had been convicted of theft, one of coining, and one of forgery.

We now come to the second class of offences, denominated *delits*, and cognizable by the tribunals of Correctional Police. In 1825, 141,733 persons were charged with offences of this description; and 159,740, in 1826.

Of these there were—

	1825.	1826.
Acquitted	23,482	25,356
Condemned to imprisonment for a year and upwards	5,110	6,004
————— for less than a year	17,454	21,285
————— to pay a fine	95,682	107,087
Captains of ships interdicted from all command	5	8
Total	141,733	159,740

Twenty-three tables in the *Compte Général* of 1825, and twenty-four in that of 1826, are allotted to this part of the subject. The additional table for the latter year, classes the accused according to their sex and age; it is to be found subjoined.

Of 90,061 (i) judgments pronounced in 1825, by the tribunals of Correctional Police, 4,688 were appealed against, of which 2,436 were confirmed, and 2,252 reversed or modified: in 532 cases additional evidence was called. Of 108,390 judgments of the same tribunals, in 1826, 5,031 were appealed against; 2,705 confirmed, and 2,326 reversed or modified:—additional witnesses were called in 453 cases.

With respect to the third class of offences (*contraventions*), cognizable by the *juges de paix*, the following abstract of the tables may be sufficient:—

	1825.	1826.
Number of persons accused of contraventions	139,944	141,021
Acquitted	19,040	19,141
Sentenced to fine (from 1 to 15 francs)	113,269	114,314
————— to imprisonment (from 1 to 5 days)	5,822	5,432
With respect to whom the tribunal declared itself incompetent	1,813	2,134
	139,944	141,021

(i) See next page.

The fourth part of the *Compte Général* of 1826, consists of eight tables, which indicate the course of proceedings in the different courts, and the degree of promptitude displayed by each in the execution of its functions. It appears that, averaging the judgments pronounced by the Courts of Assize throughout the kingdom, sixty-four cases in one hundred were decided within the first six months after the commission of the crime. The tribunals of Correctional Police were, as might be anticipated, considerably more expeditious; having dispatched nine-tenths of the cases submitted to them within three months after the offence. Of the appeals brought against decisions of these tribunals, sixty-three in one hundred were determined within two months after the appeal was lodged.

The last table of the fourth part furnishes some interesting information respecting the operation of juries in each of the departments throughout the kingdom; to understand which, it is necessary that the reader should be made acquainted with certain peculiarities which mark the forms of proceeding in trial by jury in France. The law of France does not, as in England, insist upon absolute unanimity in twelve men of differently constituted minds; it does not starve into harmony of opinion, nor make the verdict depend upon the relative powers of fasting belonging to the jurymen;—"itaque," says Von Globig, commenting upon our custom, "*veritas legalis à stomachi constitutione pendeat.*" (k) The majority of voices determines the question. If the jury is equally divided, the *calculus Minervæ* turns the scale, and mercy prevails. But if there should be seven voices to five (*une simple majorité*) against the accused, the jury is bound to certify the fact to the Court; whereupon the president and four judges deliberate on the matter; and if four out of the five agree in opinion with the minority of the jury, the consequence is an acquittal. From the table before us, then, it appears that out of 398 cases that occurred in 1826, in which there was only a *simple majority* of the jury against the accused, the Court agreed with

(i) The number of persons accused necessarily exceeds the number of judgments; one judgment often affecting two or more persons, according to the number implicated in one and the same charge.

(k) *Censura Rei Judic. præf. p. 54.* Full many a juryman has had reason to exclaim in the words of the tragic poet:—

Νικα δὲ χρεια μ' ἡ κακὸς τ' ὀλεμένη
Γαστήρ.

"necessity and my accursed belly

convince me." A case occurred within our own knowledge, in which a juryman, upon retiring with his brethren to consider the verdict, announced to them that he would eat his shoes rather than convict the party. The shoes were good, wholesome, winter shoes, *une bonne pièce de résistance*. It may readily be imagined, that those of his companions who were accustomed to tenderer viands quickly yielded to such cogent reasoning.

the majority in 319, and with the minority in 79 instances. The concluding table, which forms the appendix to the *Compte Général* of 1826, contains a statement of the various charges for offences against the Law of the Press, determined by the Tribunal of Correctional Police of the Seine. The reader will find subjoined the entire table, which exhibits some very curious, and not unamusing items of offence; such as—"Insertion of political articles in literary journals,"—"Exciting contempt and hatred against a class of persons," &c.

We have now gone through both official documents, and have presented to our readers the principal results of their minute and multifarious calculations. The object of *M. Le Garde des Sceaux*, in compiling these memorials of transgression, cannot be better explained, than by giving his own statement, stripped of a few rhetorical flourishes. "The above details," he observes, "sufficiently prove the utility of this authentic collection of facts relative to matters so intimately connected with the great interests of society. The magistrates who have furnished the elements of the work will be the first to reap advantage from it. These tables, which shall be distributed amongst them, will be admirably calculated to support and guide their zeal. By these means, the improvements effected in one tribunal will be known and imitated in the others: each will strive to afford an example worthy of being followed; and however satisfactory the course of justice may hitherto have been, I do not scruple to predict that it will become each year more regular and more steady. It is principally with this view that the present work has been undertaken. But it is easy to foresee that it will contribute hereafter to the perfecting of our legal system, the advantages and inconveniences of which it will equally exhibit. The government will be apprised by a succession of observations of the changes that may become necessary. These tables, distributed to the Chambers, will not serve merely to justify the expenditure of the department of justice; those, who are disposed to meditate on criminal matters, will thence derive, with respect to all that relates to the application of this part of our laws, such clear and precise notions, as they would in vain seek elsewhere. The accurate knowledge of facts is one of the first exigencies of our form of government; it enlightens and simplifies our deliberations; it gives them a sure basis, by substituting the positive and certain lights of experience for vague theoretical speculation."—(*Compte Général*, 1825.)

That the records before us *may* be made productive of all the practical advantages anticipated by M. Peyronnet, we most fully believe; that they *will* be turned to this good account, is more than we would venture to predict; knowing, from ample experience, how frequently official persons and public bodies exhaust

all their zeal and energy in the collection of materials and costly apparatus, in laying foundations, in bustle and circumstance and preparation, and then leave the superstructure to be raised by some such process as that fortuitous concourse of atoms imagined by ancient sages. To the eye of philosophy, however, these tables, the Confessions, as M. Lucas terms them, (1) of thirty-two millions of people, possess an immense value, and may lead the way to the solution of some of the most interesting problems in criminal law. It has already been observed, that the statement of 1826 is far more complete in all its parts than that of the preceding year. There still remains considerable room for improvement. The general arrangement of the subdivisions is not altogether free from objection, and we are agreed with a correspondent in regarding it as a capital defect, that the number of the *accused* is made the basis of all the statistical calculations, instead of the number of the *convicted*. If the positive existence of the crime were always certain, and the only object of judicial investigation were to ascertain the perpetrator, there would be some reason for the method here adopted, as the circumstance that A. B. was accused instead of X. Y. could make no difference in the calculation. But as homicide is not necessarily murder, nor the taking of property from another necessarily theft, and as in nine cases out of ten, the circumstances attending a particular act stamp it with the character of guilt or innocence, and those circumstances are to be elicited by the trial, the *ratio* of crime stated in some of these tables is evidently erroneous. In England, we are prepared for such deceptive statements; for, although the written language of our law breathes nothing but humanity, and expressly declares that every man shall be presumed innocent, until he is proved guilty, the practice of the law is too often directly the reverse, and would almost lead us to consider suspicion equivalent to proof, accusation to condemnation. Thus we find a decision of the Supreme Court of Criminal Justice, subjecting untried prisoners—presumed innocent—to the gratifying alternative of hard labour, in the midst of convicted felons, or the pampering fare of bread and water. (m) In the same spirit, also, it is not unusual

(1) Du Système Penal. Introd. p. 18. This author does no great honour to M. Peyronnet's work, by fancifully comparing it to the Confessions of the "great founder and professor of the philosophy of vanity," Rousseau:—" Dans le siècle dernier, un homme se rencontra qui étonna les contemporains en écrivant ses confessions pour le grand jour de la publicité. Et bien, voici les confes-

sions d'un peuple de trente-deux millions d'hommes qui livre au monde deux années de sa vie, et à peine songe t'on à remarquer, à constater même cet événement sans exemple!"

(m) *Rex v. Justices of the N. Riding of Yorkshire*, 2 B. and Cr. 286. The humane determination of the Court of King's Bench in this case, in which the nutritious and excellent qualities of bread, and the balmy

for judges to harangue a man, upon his *acquittal*, in a strain which they would scarcely adopt towards the same man *before* his trial; as if the absolving verdict of a jury only rendered his guilt the more apparent.⁽ⁿ⁾

The defect in the official documents before us can fortunately be remedied without much difficulty, as the acquittals and convictions under each particular head of crime, and in each department, are invariably given; and this, with some few other alterations, will probably suggest themselves to *M. Le Garde des Sceaux*, as the national work proceeds.

M. Peyronnet, in his preliminary statements, has studiously, and we think, discreetly abstained from drawing any general inferences as to the comparative moral state of France, from the facts hitherto disclosed. In the *Rapport au Roi* of 1825, he remarks:—"On ne peut tirer aucune conséquence certaine de ces résultats d'une seule année; mais il est évident que le rapprochement de plusieurs années aidera plus tard à déterminer les circonstances qui concourent à augmenter ou à diminuer le nombre des crimes." But it is not every one that is possessed of sufficient circumspection and self-command, to await the maturity of events, reserving the judgment, until it can be pronounced with certainty and effect. M. Lucas, impatient of any such delay, rushes at once to a conclusion; and it is quite inspiring to witness the nimbleness and flexibility, as well as the air of perfect self-satisfaction, with which he overleaps or slips through all the obstacles that oppose his career. In the introduction to his Treatise "*Du Système Pénal, et du Système Répressif*," he proposes to prove from the tables before us, that the north of France, "*France éclairée*" consisting of thirty-two departments, and thirteen millions of inhabitants, possesses a larger share of moral principle than the south, "*France obscure*," consisting of fifty-four departments, and eighteen millions of inhabitants.

Upon referring to the tables, he discovers that the number of persons accused of crime in *enlightened France*; in 1825, is 3538, and in 1826, 3485; ^(o) whilst the number in *France gloomy* is 3696 in the former year, and 3503 in the latter; being an excess of only 158, or about 1-24th in the one year for the ad-

virtues of pure water, were descanted upon with an eloquence that would have done honour to my Lord Peter, was annulled by the legislature, 5 Geo. 4. c. 85.

⁽ⁿ⁾ The reader need scarcely be reminded of a recent instance that occurred at the Old Bailey.

^(o) In these calculations for 1826,

the number of persons tried *par contumace* is omitted. M. Lucas mentions this circumstance in a note. It is not, therefore, as a charge against his accuracy, that we state the fact, but in order to reconcile his estimate with that given in the former part of our paper.

ditional five millions of inhabitants belonging to *France gloomy*, and scarcely any excess at all in the other. This result, however, by no means staggers M. Lucas; "pourtant," he observes, "je compte arriver, et d'une manière sûre et incontestable, à des conséquences toutes contraires à celles qu'on tendrait d'abord en tirer."

In order, then, to arrive at these consequences, he has recourse to the grand division of crime into offences against persons, and offences against property, or, as he terms them, *personal* and *real* crimes. Here he finds that accusations for offences of the first description predominate to a great extent in the south of France, whilst charges of crime against property prevail to a still greater extent in the north; (p) a discovery which, to his seeming, settles the question at once, establishing beyond dispute the superior morality of *France éclairée*—for, he observes, "*assurément on ne contestera pas que les crimes contre les personnes ne soient ceux qui contiennent le plus d'immoralité, et l'on ne s'avisera certes jamais d'appeler le plus moral le pays où il y aura le plus grand nombre de meurtres, d'assassinats, de parricides, d'infanticides, d'empoisonnemens,*" &c. A most convenient mode of reasoning, it must be granted, and one that we would strongly recommend to all those who are fond of treading debatable ground, in the manifold embarrassments to which their hardihood may expose them. Let them merely take it for granted, that no one will dispute the *only disputable point*, and they will be surprised to find how smooth and tractable the most thorny subjects will become. All that astonishes us is, that in the treatise to which the passage quoted is an introduction, M. Lucas should have written so many pages to demonstrate the inadmissibility of death as a punishment, when he might have disposed of the matter in so summary a manner, by simply saying:—"Assuredly it will not be contested, that there are many other punishments quite as efficacious for all purposes, if not more so, than the punishment of death."

If the north of France is entitled to the honourable distinction assigned to it, and is really thus superior in civilization to the south, it could scarcely be necessary to refer to the calculations of *M. Le Garde des Sceaux*, in order to arrive at the conclusion that the crimes of the north would be different in character from those of the south. We are not now to learn, for the first time, that

(p) After stating the comparative number of *accusations* for crimes in the north and south of France for the two years, M. Lucas sums up thus:—"Ainsi la France obscure commet dans deux années 1093 crimes personnels de plus que la France éclairée,"

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et le France éclairée, dans le même espace de temps 917 crimes réels de plus que la France obscure." A curious illustration of the fallacy of making the number of *accused* the basis of calculation in M. Peyronnet's tables.

2 I

civilization humanizes and softens the habits, and gives a different complexion and colour to vice, as well as to virtue. But to assert that it *therefore* sublimates the moral feeling, and that the smooth and polished miscreant of the present day, who gently plunders his neighbour of his property, is more moral than his rugged ancestor in guilt, who would avenge a slight affront with blood, is a proposition not the less puerile, because it is false. In saying this, we are by no means inclined to disparage the moral benefits that flow from light and information; all that we mean to hint is, that the cause of civilization, if it needs an advocate, requires one who, to the zeal and humanity of M. Lucas, adds a somewhat larger share of logic.

The latter part of the sentence above quoted is an exquisite specimen of that figure of rhetoric which is familiarly termed *throwing dust in the eyes*. "No one, certainly," says M. Lucas, "could ever think of calling that country the most moral, in which there is the greatest number of homicides, assassinations, parricides, infanticides, poisonings," &c. But what? if a Girondist, an inhabitant of *tenebrose* France, were to say:—"No one, surely, in his senses could ever dream of calling that the most moral country, where there is the greatest number of forgeries and thefts—where houses are burnt, and churches robbed—where embezzlement and peculation, extortion, bribery, corruption, and every species of cozenage and fraud, spring up and flourish, like weeds in a hot-bed."

Although few of our readers may feel any disposition to follow the hasty steps of M. Lucas, and to emulate either his dialectics or his rhetoric; yet, as the contemplation and comparison of such painfully interesting documents may not only furnish food for speculation, but lead to many safe conclusions and beneficial consequences, we have annexed, in addition to the Tables of M. Peyronnet, before mentioned, the Parliamentary Returns of the Committals upon criminal Charges, in England and Wales, during the seven years 1820—1826, and a short summary of the criminal prosecutions in Spain, in 1826. Upon these statements a thousand systems may be built by those that have talent and taste for systematising;—a thousand fanciful schemes and airy hypotheses; but the philosopher, the statesman, and the general philanthropist, will also be able to derive thence no small accession of that knowledge,—the knowledge of facts,—upon which alone can be founded any measures of moral or legislative improvement.

STATE OF CRIME IN FRANCE.

1825.—Crimes against Persons.

Nature of the crimes.	Number of Persons			Number of Persons condemned to									
	Accused.	Acquitted.	Death.	Hard labour (travaux forcés.)	Reclusion. (c)		Gally (cercles.)	Banishment	Civic degradation. (d)	Correctional punishments.	No. of children confined in a house of correction.		
					For life.	For a time.							
Political crimes and delinquencies	3	2	1	0	0	0	0	0	0	0	0	0	0
Rebellion (b).....	237	167	1	0	9	19	0	0	0	0	41	0	0
Contravention of sanitary laws	2	2	0	0	0	0	0	0	0	0	0	0	0
Breach of prison	1	1	0	0	0	0	0	0	0	0	0	0	0
Perjury and subornation	94	52	0	0	9	29	0	0	2	2	0	0	0
Murder (<i>assassinat</i>) (c)	244	102	81	31	5	10	0	0	0	15	0	0	0
Poisoning	50	29	16	0	0	4	0	0	0	1	0	0	0
Parricide	7	2	4	0	0	1	0	0	0	0	0	0	0
Manslaughter (<i>meurtre</i>) (c).....	390	178	22	87	1	9	0	0	0	92	1	0	0
Cutting and maiming (<i>coups et blessures</i>) ..	446	227	0	0	10	56	0	0	0	153	0	0	0
Violent assault of parents (<i>coups envers des ascendants</i>)	83	39	0	0	1	38	0	0	0	5	0	0	0
False imprisonment	1	1	0	0	0	0	0	0	0	0	0	0	0
Threats, to extort (<i>menaces sous condition</i>) ..	1	1	0	0	0	0	0	0	0	0	0	0	0
Violence on the part of beggars (<i>mendicité avec violence</i>)	2	0	0	0	0	1	0	0	0	1	0	0	0
Bigamy	16	3	0	0	13	0	0	0	0	0	0	0	0
Procuring abortion	14	4	0	0	1	8	0	0	0	0	1	0	0
Infanticide	140	62	9	15	0	3	0	0	0	51	0	0	0
Crimes affecting minors, ravishment, &c..	27	19	0	0	1	6	0	0	0	1	0	0	0
Rape, and assault with intent	210	104	0	12	13	48	0	0	0	33	0	0	0
Rape of children under 15 years	101	26	0	10	52	6	0	0	0	3	2	0	0
Total.....	2069	1023	134	153	115	238	0	0	2	398	4	0	0

1826.

Violation of liberty—false imprisonment ..	6	4	0	0	1	0	0	0	1	0	0	0	0
Rebellion	202	145	0	0	2	23	0	0	0	32	0	0	0
Assaulting magistrates in the courts	2	1	0	0	0	0	1	0	0	0	0	0	0
Association of malefactors	15	3	0	1	1	9	0	0	0	1	0	0	0
Violence on the part of beggars	3	0	0	0	0	1	0	0	0	2	0	0	0
Manslaughter	298	146	11	34	2	22	0	0	0	82	1	0	0
Murder	312	117	88	54	12	6	0	0	0	34	1	0	0
Parricide	14	9	4	0	0	1	0	0	0	0	0	0	0
Infanticide	132	55	6	25	0	0	0	0	0	45	1	0	0
Poisoning	26	14	11	0	0	0	0	0	0	0	1	0	0
Threats, to extort	9	5	0	0	3	0	0	0	0	1	0	0	0
Cutting and maiming	363	195	0	0	9	21	0	0	0	138	0	0	0
Violent assault of parents, &c.	75	28	0	0	3	37	0	0	0	7	0	0	0
Procuring abortion	18	9	0	0	1	8	0	0	0	0	0	0	0
Rape, and assaults with intent	163	82	0	1	4	48	0	0	0	27	1	0	0
Rape of children under 15	142	51	0	6	67	3	0	0	0	13	2	0	0
Bigamy	14	4	0	0	10	0	0	0	0	0	0	0	0
Crimes affecting minors, &c.	26	13	0	0	2	6	0	0	0	5	0	0	0
Perjury and subornation	87	59	0	1	10	17	0	0	0	0	0	0	0
Total.....	1907	940	120	122	127	202	1	0	1	387	7	0	0

(a) See p. 463 *ante*, and notes.(b) *Rebellion* is the forensic term in France for obstruction of public officers.(c) *Assassinat* signifies homicide committed with premeditation; *meurtre*, homicide that is voluntary, but without premeditation.

Nature of the crimes.	Number of persons		Number of persons condemned to									Number of children confined in a house of correction.
	Accused.	Acquitted.	Death.	Hard labour (travaux forçés.)		Reclusion.	Pillory.	Banishment.	Civil degradation.	Correctional punishment.		
				For a life time.	For a term.							
Extortion and corruption	43	96	0	1	4	3	6	0	0	3	0	
Embezzlement of public money	2	2	0	0	0	0	0	0	0	0	0	
Setting fire to buildings	102	73	22	0	2	0	0	0	0	0	0	
Setting fire to other property	15	12	2	1	0	0	0	0	0	0	0	
Malicious mischief	40	35	0	0	2	2	0	0	0	1	0	
Coining	49	31	10	3	5	0	0	0	0	0	0	
Counterfeiting seals, stamps, &c.	10	6	0	0	0	2	0	0	0	2	0	
Fraudulently personating another	42	20	0	0	22	0	0	0	0	0	0	
Forgery of commercial securities	145	37	0	3	94	10	0	0	0	1	0	
Other kinds of forgery	270	107	0	10	58	83	0	1	0	11	0	
Fraudulent bankruptcy	134	44	0	2	73	2	0	0	0	13	0	
Robbery in a church	51	50	1	4	16	3	0	0	0	5	2	
Highway robbery	117	34	0	44	11	15	0	0	0	10	3	
Stealing in houses	995	281	0	5	74	466	0	0	0	153	8	
Other thefts	3111	867	7	118	780	553	0	0	0	760	36	
Extortion of bonds, signatures, &c.	31	12	0	4	13	2	0	0	0	0	0	
Subtraction and suppression of titles, records, &c.	5	2	0	1	1	1	0	0	0	0	0	
Breach of seals affixed by public authorities	2	0	0	0	0	0	0	0	0	2	0	
Smuggling	1	0	0	1	0	0	0	0	0	0	0	
Crimes against persons	5165	1617	42	196	1156	1132	6	1	0	961	54	
	2069	1023	134	155	115	238	0	0	2	398	4	
Total	7234	2640	176	351	1271	1370	6	1	2	1359	58	
Total condemned	4594											

1826.

Coining	48	27	9	5	1	0	0	0	0	5	1	0
Counterfeiting seals, stamps, &c.	17	14	0	0	3	0	0	0	0	0	0	0
Fraudulently personating another	45	34	0	0	11	0	0	0	0	0	0	0
Forgery of commercial securities	104	32	0	3	62	6	0	0	0	1	0	0
Other kinds of forgery	250	112	0	9	40	77	0	1	0	11	0	0
Extortion and bribery	42	34	0	0	0	3	4	0	0	1	0	0
Embezzlement of public money	3	2	0	1	0	0	0	0	0	0	0	0
Subtraction of records	2	2	0	0	0	0	0	0	0	0	0	0
Robbery in a church	57	19	0	4	16	6	0	0	0	8	4	0
Highway robbery	136	69	1	30	8	5	0	0	0	22	1	0
Stealing in houses	1172	333	0	4	71	502	0	0	0	256	6	0
Other thefts	2995	897	2	102	761	423	0	0	0	775	35	0
Extortion of bonds, &c.	17	11	0	0	5	0	0	0	0	1	0	0
Fraudulent bankruptcy	89	37	0	1	34	0	0	0	0	17	0	0
Setting fire to buildings	74	54	17	0	0	0	0	0	0	1	2	0
Setting fire to other property	11	9	1	0	0	0	0	0	0	1	0	0
Destruction of buildings	16	11	0	0	0	4	0	0	0	1	0	0
Loss of ship, caused by neglect of the pilot	1	1	0	0	0	0	0	0	0	0	0	0
Smuggling with arms	2	2	0	0	0	0	0	0	0	0	0	0
Crimes against persons	5081	1700	30	159	1012	1036	4	1	0	1100	49	0
	1907	940	120	122	127	202	1	0	1	387	7	0
Crimes judged <i>par contumace</i> (a)	6988	2640	150	281	1139	1228	5	1	1	1487	56	0
	603	41	47	72	234	199	0	0	1	8	1	0
Total	7591	2681	197	353	1373	1427	5	1	2	1495	57	0
Total condemned	4910											

(a) In the *Compte Général* of 1826 there is a distinct table of the persons sentenced in their absence as contumacious; in that of 1825, they are mixed up in the general statement.

Committals, &c. in 1826.

Table distinguishing the Persons accused and condemned, in 1826, according to their Sex and Age
(exclusive of those judged *per contumace*.)

Males.	Accused.	Acquitted.	Condemned to								
			Death.	Hard labour		Reclusion.	Pillory.	Banishment.	Civic degradation.	Correctional punishment.	Detention in a house of correction.
				for life.	for a time.						
Under 16 years of age.....	102	39	0	0	0	0	0	0	0	15	48
From 16 to 21.....	921	269	10	14	180	183	1	0	0	264	0
21 to 25.....	974	376	16	33	185	155	0	0	0	209	0
25 to 30.....	1046	386	18	48	193	189	1	0	1	210	0
30 to 35.....	741	292	16	41	129	108	0	0	0	155	0
35 to 40.....	500	200	20	34	84	68	1	0	0	93	0
40 to 45.....	484	176	17	30	93	79	1	1	0	87	0
45 to 50.....	313	121	10	11	62	52	1	0	0	56	0
50 to 55.....	220	93	8	10	25	31	0	0	0	53	0
55 to 60.....	149	71	11	6	17	24	0	0	0	19	0
60 to 65.....	115	56	5	5	11	20	0	0	0	18	0
65 to 70.....	69	31	0	5	11	7	0	0	0	15	0
70 to 80.....	37	17	4	2	1	6	0	0	0	7	0
80 upwards.....	3	1	0	0	1	0	0	0	0	1	0
Age unknown.....	39	8	0	4	13	6	0	0	0	8	0
Total.....	5712	2136	135	243	1005	928	5	1	1	1210	48
Females.											
Under 16 years of age.....	22	12	0	0	0	0	0	0	0	2	8
From 16 to 21.....	180	53	1	1	15	63	0	0	0	47	0
21 to 25.....	189	77	2	3	7	50	0	0	0	50	0
25 to 30.....	254	106	1	14	26	56	0	0	0	51	0
30 to 35.....	186	82	1	8	17	37	0	0	0	41	0
35 to 40.....	143	53	1	8	19	29	0	0	0	33	0
40 to 45.....	117	40	3	2	16	32	0	0	0	24	0
45 to 50.....	85	34	3	1	19	18	0	0	0	10	0
50 to 55.....	41	20	0	0	6	7	0	0	0	8	0
55 to 60.....	20	8	0	0	6	3	0	0	0	3	0
60 to 65.....	20	9	0	1	3	4	0	0	0	3	0
65 to 70.....	8	5	2	0	0	0	0	0	0	1	0
70 to 80.....	4	3	1	0	0	0	0	0	0	0	0
80 upwards.....	0	0	0	0	0	0	0	0	0	0	0
Age unknown.....	7	2	0	0	0	1	0	0	0	4	0
Total	1276	504	15	34	134	300	0	0	0	277	8
Total Males.....	5712	2136	135	243	1005	928	5	1	1	1210	48
Grand total.....	6958	2640	150	281	1139	1228	5	1	1	1487	56

1886.

Table distinguishing the Persons accused before the Tribunals of Correctional Police, according to their Sex and Age.

Number of persons condemned to										
Males.	Accused.	Acquitted.	Fine.	Imprisonment (with or without fine).			Put under the surveillance of the police.	Intervened the rights mentioned in Art. 42 of the Code Penal. (a)	To make reparations, or to remove from a particular place. (b)	Under the qualifications of Art. 463 of the Code Penal. (c)
				For a first offence.	For a second offence.	One year or upwards.					Less than a year.
Under 16 years of age.....	3,856	934	1,313	909	49	253	63	4	0	326
From 16 to 21.....	9,641	1,853	4,927	2,934	127	627	249	23	2	1,108
Above 21 years.....	70,356	15,317	35,713	14,908	1,330	3,466	1,608	338	7	6,483
Age unknown.....	42,054	2,142	36,482	1,144	286	161	52	17	0	108
Total.....	126,089	20,306	84,095	19,995	1,785	4,507	2,093	376	9	7,925
Females.										
Under 16 years of age.....	1,184	346	669	166	3	29	7	0	0	42
From 16 to 21.....	2,958	542	1,854	535	27	142	76	3	0	224
Above 21 years.....	15,860	3,521	7,740	4,208	391	1,287	661	97	2	1,834
Age unknown.....	13,649	641	12,729	185	94	39	13	3	0	44
Total females.....	33,651	5,050	22,992	5,094	515	1,497	767	103	2	2,154
Total males.....	126,089	20,306	84,095	19,995	1,785	4,507	2,093	376	9	7,925
Grand total.....	169,740	25,356	107,087	24,989	2,300	6,004	2,819	479	11	10,079

(a) The right of voting at elections, or being elected; of sitting on a jury, holding any public office, carrying arms, being a guardian, &c.

(b) Under the provisions of Articles 227 and 229 of the Code Penal.

(c) The Article 463 of the Code Penal authorizes the tribunals to reduce the fine, or term of imprisonment, below the regular minimum, when the damage done does not exceed the value of 25 francs, and where there are strong circumstances in extenuation.

1826.—Offences of the Press, tried before the Tribunal of Correctional Police of the Seine,—
(*Petit Parquet.*)

Nature of the publications, and offences charged.	Number of persons accused.		Number of prosecutions instituted by		No. of accused.		Number of works.	
	Cases.	Persons accused.	Private individuals.	The public prosecutor.	Acquitted.	Sentenced To fine. To fine and imprisonment.	Prosecuted.	Condemned.
Books—Biography.								
Outrage to public morals and good manners } (bonnes mœurs)	3	12	0	3	7	2	3	2
Outrageous language against Members of the } Chambers	5	32	0	5	5	15	12	5
against public functionaries	4	23	0	4	18	1	4	3
Defamation of private individuals	1	1	1	0	1	0	1	0
	13	68	1	12	31	18	19	10
Other Books and Pamphlets.								
Outrage to public morals	1	3	0	1	2	0	1	1
to religious morals (<i>la morale religieuse</i>) ..	1	1	0	1	1	0	1	1
to public & religious morals & good manners..	3	6	0	3	4	0	2	3
to religious morals, and the religion of } the State	1	7	0	1	6	0	1	1
to religious morals, the religion of the } State, and good manners, exciting } public contempt and hatred against } the ministers of religion	1	3	0	1	0	0	3	1
to public and religious morals and good } manners, and against a minister of } religion	2	4	0	2	1	0	3	2
to the religion of the state, exciting } hatred against the clergy, and against } the King's government, &c.....	1	2	0	1	0	0	2	1
Attack upon the Royal Dignity; outrage to } the religion of the state	1	2	0	1	1	0	1	1
the rights guaranteed by article 5 } of the charter (a)	1	3	0	1	2	1	0	1
Outrageous language against the Chamber of } Deputies	1	5	0	1	0	4	1	1
Encouraging disobedience to the laws	1	2	0	1	1	1	0	1
Defamation of private individuals	1	1	1	0	0	1	0	1
	28	107	2	26	49	25	33	24
Journals.								
Insertion of political articles in literary journals....	5	20	0	5	9	9	2	5
Encouraging disobedience to the laws, & rebellion }	1	4	0	1	3	1	0	1
Exciting contempt and hatred against a class of } individuals	1	1	0	1	0	0	1	1
Defamation of private individuals	2	4	2	0	1	3	0	2
Traducing the memory of the dead	1	1	1	0	1	0	0	1
	38	137	5	33	63	38	36	32
Publications discussing private interests.								
Defamation	4	7	4	0	5	0	2	4
Diverse contraventions of the law of the press.								
Sale of condemned publications	5	8	0	5	6	1	1	0
Sale of unstamped foreign publications	1	1	0	1	0	1	0	1
Sale, or exposure for sale, of unauthorised } engravings, &c.	6	10	0	6	4	0	6	0
Following the trade of a bookseller without license }	11	16	0	11	5	11	0	0
Hawking books without license	4	5	0	4	2	2	1	0
Total	69	194	9	60	85	53	46	34

(a) This article guarantees liberty of conscience, and undisturbed freedom of worship to all

STATE OF CRIME IN ENGLAND.

Number of Persons charged with Criminal Offences, committed to the different Gaols in England and Wales, for Trial, in each County.

In the years	1820.	1821.	1822.	1823.	1824.	1825.	1826.
	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.
Anglesey	4	10	4	10	9	7	8
Bedford	61	137	107	106	102	123	83
Berks	142	159	145	162	148	154	140
Brecon	36	15	9	11	16	21	14
Bucks	97	86	101	121	143	160	113
Cambridge	88	153	115	155	110	137	143
Cardigan	8	7	11	2	16	4	9
Carmarthen	22	12	19	35	21	28	15
Carnarvon	10	20	9	14	26	15	14
Chester	332	312	303	249	361	306	415
Cornwall	103	87	71	68	83	109	110
Cumberland	55	66	50	38	64	57	54
Denbigh	21	17	23	14	20	26	24
Derby	94	105	90	86	77	84	134
Devon	337	341	333	356	402	437	440
Dorset	78	90	97	135	120	119	138
Durham	75	77	61	71	84	103	117
Essex	269	303	*273	*388	*460	*408	*403
Flint	22	11	16	9	6	11	12
Glamorgan	33	28	26	33	43	24	43
Gloucester	358	291	270	264	307	352	427
(Bristol)	159	166	170	142	133	133	158
Hants	315	359	267	260	321	337	285
Hereford	112	124	104	93	99	68	97
Herts	144	128	*99	*123	*138	*162	*192
Huntingdon	29	16	29	35	29	31	34
Kent	520	492	*456	*504	*617	*577	*632
Lancaster	1,963	1,716	1,663	1,632	1,897	2,132	2,374
Leicester	150	209	137	151	131	148	237
Lincoln	210	188	179	222	226	198	221
Merioneth	7	4	3	4	5	1	2
Middlesex	2,773	2,460	2,539	2,503	2,621	2,902	3,457
Monmouth	30	63	53	30	54	55	60
Montgomery	21	26	19	14	20	36	3
Norfolk	382	356	389	349	399	409	441
Northampton	133	127	128	135	109	129	123
Northumberland	110	70	81	75	89	87	72
Nottingham	251	240	213	196	204	219	267
Oxford	116	120	101	87	147	110	167
Pembroke	20	12	14	17	19	26	20
Radnor	11	5	12	8	13	24	3
Rutland	9	10	14	8	18	7	17
Salop	182	159	136	106	174	126	130
Somerset	405	423	485	380	450	523	490
Stafford	413	374	307	214	263	276	448
Suffolk	254	268	236	299	301	292	293
Surrey	525	587	*428	*537	*558	*591	*699
Sussex	215	240	*225	*292	*319	*273	*277
Warwick	594	536	431	437	542	482	581
Westmorland	17	18	14	23	21	16	9
Wilts	238	258	268	263	254	314	324
Worcester	206	257	207	173	154	165	169
York	951	757	699	624	753	883	996
Total	13,710	13,115	12,241	12,263	13,696	14,437	16,147

* The prisoners for trial at the Special Assizes commencing in December, upon the Home Circuit in each year, are included in the numbers in the following year. The prisoners for trial at the like Assizes commencing in December, 1826, are therefore not included herein.

Number of Persons Committed, Convicted, Sentenced, Acquitted, &c. &c.

In the years	1820.	1821.	1822.	1823.	1824.	1825.	1826.	Total number in the seven years.
	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	
Committed for trial—viz.								
Males	11,595	11,173	10,369	10,342	11,475	11,889	13,461	80,304
Females	2,115	1,942	1,872	1,921	2,223	2,548	2,686	15,307
Total.....	13,710	13,115	12,241	12,263	13,698	14,437	16,147	95,611
Convicted and sentenced:								
To Death*	1,236*	1,134*	1,016*	968*	1,066*	1,036*	1,200*	7,656
Transportation for life....	221	155	132	116	117	126	133	1,000
14 years	341	272	84	78	107	129	185	1,196
10 years	1	1						2
7 years	1,655	1,675	1,316	1,327	1,491	1,419	1,945	10,928
4 years					1			1
5 years		1	2					3
Imprisonment, and severally to be whipped, fined, kept to hard labour, &c.								
3 years	15	10	11	11	11	7	11	76
2 years & above } 1 year	355	286	376	324	339	365	297	2,342
1 year, & above } 6 months	1,153	1,117	1,129	1,074	1,218	1,193	1,201	8,085
6 months, & under	4,089	3,872	3,899	4,040	4,861	5,408	5,813	31,985
Whipping, and fine ..	252	265	244	266	214	281	310	1,832
Total convicted	9,316	8,788	8,209	8,204	9,425	9,964	11,095	65,003
Acquitted	2,511	2,501	2,348	2,430	2,611	2,788	3,266	18,505
No bills found, and not prosecuted	1,881	1,826	1,684	1,579	1,662	1,685	1,786	12,103
Total.....	13,710	13,115	12,241	12,263	13,698	14,437	16,147	95,611
* Of whom were executed	107*	114*	97*	54*	49*	50*	57*	523*

CONVICTED.

Nature of the crimes of which persons were convicted in the years }	1880.	1881.	1882.	1883.	1884.	1885.	1886.
	No of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.
Arson, and other wilful burning of property	3	5	17	6	6	7	3
Bigamy	14	18	23	19	22	25	35
Burglary	283	294	312	261	302	276	309
Cattle stealing	22	14	9	24	19	24	21
Maliciously killing and maiming . .	1	1	.....	.....	2	.....	.....
Child stealing	3	3	3	1	.....	3	1
Coining . . . . .	.....	.....	2	1	2	1	7
Coin, putting off and uttering counterfeit..	168	206	183	174	204	174	209
ditto (<i>having been convicted as common utters</i>)	1	.....	.....	1	2	2	1
Embezzlement, (<i>by servants</i>)	43	42	59	64	71	70	91
Forgery and uttering forged instruments..	101	70	35	29	22	18	23
Forged bank notes, having in possession, &c.	272	180	1	.....	.....	.....	4
Framebreaking and destroying machinery	.....	1	.....	.....	.....	3	.....
Fraudulent offences	163	211	182	147	142	176	157
Game laws, offences against	131	149	97	153	140	109	128
Horse stealing	111	129	102	134	104	165	120
Housebreaking in the day time, and larceny	158	167	102	124	128	112	125
Larceny, simple	6,499	6,152	5,946	5,977	6,914	7,293	8081
in a dwelling house, to the value of 40s.	163	134	133	145	188	186	222
in a shop, &c. privately, &c.	33	5	.....	1	2	.....	.....
on a navigable river, &c. to the value of 40s.	1	1	.....	.....	.....	.....	.....
of naval stores, to the value of 20s.	3	.....	.....	.....	.....	.....	.....
from bleaching grounds, &c.	4	.....	2	.....	.....	.....	1
from the person	454	337	343	329	446	532	658
Letter, containing bank note, &c. secreting and stealing . . . . .	.....	.....	.....	.....	1	2	.....
Sending threatening	2	1	1	.....	2	.....	3
Manslaughter	36	49	49	53	50	62	62
Murder	14	23	24	12	17	12	13
shooting at, stabbing, and administering poison with intent to conceal the birth of their infants	8	12	33	14	21	17	14
concealing the birth of their infants	7	2	9	9	6	7	7
Oath unlawful, taking and administering .	1	.....	.....	.....	.....	.....	.....
Perjury	8	8	9	4	3	7	6
Piracy . . . . .	.....	.....	.....	.....	.....	2	.....
Rape, &c.	11	6	10	11	9	6	4
, assault, with intent to commit.	33	32	48	46	43	42	83
Riot and felony . . . . .	.....	2	.....	.....	.....	.....	48
Robbery on the person, on the highway, and other places	133	160	141	113	124	93	144
Sacrilege	9	5	8	4	4	1	4
Sheep stealing, and killing with intent to steal	143	90	66	79	105	104	127
Sodomy	3	1	4	3	1	2	1
assault with intent to commit, and other unnatural offences	17	7	23	27	15	25	20
Stolen goods, receiving	119	148	121	117	184	131	156
Treason, High	33	1	.....	.....	.....	.....	.....
Transports being at large, &c.	2	9	4	4	3	4	12
Felony, cutting down trees, growing, &c. .	.....	.....	1	1	.....	.....	.....
stealing part of a wreck . . . . .	.....	.....	1	1	.....	.....	.....
armed to assist smugglers . . . . .	.....	.....	.....	.....	1	2	1
rescuing felons . . . . .	.....	4	.....	.....	.....	.....	.....
trafficking in slaves	2	.....	.....	.....	.....	.....	.....
Felony and Misdemeanor, (<i>not otherwise described</i>)	106	109	97	116	120	269	195
Total number of persons convicted in each year	9,318	8,788	8,209	8,204	9,425	9,864	11,095

ACQUITTED.

Nature of the crimes for which persons were tried and acquitted, in the years	1820. No. of Persons.	1821. No. of Persons.	1822. No. of Persons.	1823. No. of Persons.	1824. No. of Persons.	1825. No. of Persons.	1826. No. of Persons.
Arson, and other wilful burning of property	17	8	22	11	14	8	8
Bigamy	8	6	1	6	3	7	5
Burglary	105	121	84	99	88	101	115
Cattle stealing	8	.....	4	3	4	10	2
— maliciously killing and maiming ..	3	6	.....	2	1	2	5
Child stealing	1	.....	.....	.....	1	1	1
Coining	1	.....	.....	2	.....	2	.....
Coin, putting off, and uttering counterfeit	40	36	29	28	41	19	48
Embezzlement (by servants)	15	20	29	23	26	26	39
Forgery, and uttering forged instruments	50	34	19	14	11	11	14
Forged bank notes, having in possession, &c.	6	2	.....	.....	.....	.....	1
Fraudulent offences	53	66	49	52	50	51	44
Gambling, offences against	27	29	29	43	18	31	34
Horse stealing	30	31	20	30	32	49	35
Housebreaking in the day time, and larceny	40	31	25	26	33	27	27
Larceny, simple	1,519	1,460	1,445	1,498	1,580	1,727	1,915
— in a dwelling house to the value of 40s	45	46	40	40	54	46	59
— in a shop, &c. privately, &c.	6	6	.....	.....	.....	.....	.....
— on a navigable river, &c. to the value of 40s .....	.....	.....	.....	1	.....	.....	.....
— of naval stores, to the value of 20s.	1	.....	.....	.....	.....	.....	.....
— from the person	160	142	131	108	125	173	236
Letter, containing bank note, secreting and stealing .....	.....	.....	.....	.....	.....	.....	1
— sending threatening	3	1	2	.....	4	4	.....
Manslaughter	22	42	41	54	49	56	71
Murder	18	29	37	35	28	61	32
— shooting at, stabbing, and ad- ministering poison with intent to — concealing the birth of their infants	30	37	33	29	35	29	26
.....	1	.....	.....	.....	.....	.....	1
Perjury	2	2	2	3	1	3	7
Piracy and murder .....	.....	.....	.....	25	.....	.....	.....
Rape, &c.	14	16	14	22	16	20	14
— assault, with intent to commit ..	8	5	9	20	12	17	16
Riot and felony .....	.....	.....	.....	.....	.....	.....	19
Robbery on the person, on the highway, and other places	72	105	96	64	108	78	129
Sacrilege	1	1	3	4	1	.....	.....
Sheep stealing, and killing with intent to steal	42	51	20	23	32	41	40
Sodomy	7	3	5	6	9	4	3
—, assault with intent to commit, and other unnatural offences	3	3	5	7	4	10	11
Stolen goods, receiving	103	115	101	141	156	113	193
Transport being at large, &c.	4	.....	.....	.....	.....	.....	.....
Felony, cutting down trees, growing, &c.	.....	2	3	3	.....	.....	.....
— cutting hopbinds, &c. ....	.....	.....	.....	1	.....	.....	.....
Felony and Misdemeanor, (not otherwise described)	80	41	50	57	65	51	122
Total number of persons acquitted in each year	2,511	2,501	2,348	2,480	61	2,788	3,266

NO BILLS FOUND, AND NOT PROSECUTED.

Nature of the crimes with which persons were charged against whom no bills were found, and who were not prosecuted, in the years	1830.	1821.	1822.	1823.	1824.	1825.	1826.
	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.
Arson, and other wilful burning of property	9	13	8	11	8	7	6
Bigamy	3	5	3	3	6	1	2
Burglary	78	52	90	42	70	51	52
Cattle stealing	5	.....	5	2	.....	8	1
— maliciously killing and maiming ..	.....	1	6	.....	1	7	6
Child stealing .....	.....	1	1	1	.....	.....	.....
Coining	1	.....	.....	.....	.....	.....	1
Coin, putting off, and uttering counterfeit	33	37	21	27	20	15	25
Embezzlement (by servants)	8	13	16	10	9	✓	13
Forgery, and uttering forged instruments	28	18	8	10	1	7	10
Forged bank notes, having in possession, &c.	2	2	.....	.....	.....	.....	.....
Fraudulent offences	51	53	36	38	47	75	78
Frame-breaking, and destroying machinery	2	.....	.....	.....	.....	.....	.....
Game laws, offences against	19	21	6	27	20	11	20
Horse stealing	8	13	14	13	14	15	14
Housebreaking in the day time, and larceny	24	12	15	20	15	11	16
Larceny, simple	1,142	1,113	1,054	1,002	1,060	1,067	1,115
— in a dwelling house, to the value of 40s	41	23	18	26	33	33	19
— in a shop, &c. privately, &c.	5	6	.....	.....	.....	.....	.....
— on a navigable river, &c. to the value of 40s .....	.....	2	.....	.....	.....	.....	.....
— from bleaching grounds, &c. ....	.....	.....	2	.....	.....	.....	.....
— from the person	162	160	151	113	124	130	161
Letter, sending threatening	1	1	.....	1	1	1	1
Manslaughter	4	10	2	9	10	4	8
Murder	17	19	24	13	28	21	12
— shooting at, stabbing, and administering poison, with intent to ..	7	11	8	20	15	11	7
— concealing the birth of their infants	2	5	.....	2	.....	1	.....
Perjury	4	4	5	1	1	1	1
Rape, &c.	12	17	25	15	21	17	11
— assault with intent to commit	11	15	11	11	14	6	18
Riot and felony .....	.....	.....	.....	.....	.....	.....	2
Robbery on the person, on the highway, and other places.	391	46	41	24	26	18	33
Sacrilege .....	.....	.....	.....	.....	1	1	.....
Sheep stealing, and killing with intent to steal	2	28	19	28	18	21	23
Sodomy	5	8	4	9	3	3	.....
— assault, with intent to commit, and other unnatural offences.	7	6	5	10	8	5	4
Stolen goods, receiving	50	41	34	41	48	45	56
Transport being at large, &c. ....	.....	.....	.....	.....	1	.....	.....
Treason, High	9	.....	.....	.....	.....	.....	.....
Felony and Misdemeanor, (not otherwise described)	70	70	52	46	39	83	71
Total number of persons in each year against whom no bills were found, and who were not prosecuted	1,881	1,826	1,684	1,579	1,662	1,685	1,786

TOTAL.

Nature of the crimes with which persons were charged, in the years.....}	1820.	1821.	1822.	1823.	1824.	1825.	1826.
	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.
Arson, and other wilful burning of property	29	26	47	28	28	29	17
Bigamy	25	29	27	28	31	33	42
Burglary	466	467	466	402	460	428	476
Cattle stealing.....	35	14	18	29	23	42	24
— maliciously killing, and maiming	4	8	6	2	4	9	11
Child stealing	4	4	4	2	1	4	2
Coining.....	5	.....	2	3	2	3	8
Coín, putting off, and uttering counterfeit	242	279	233	230	267	210	283
Embezzlement (by servants).....	66	75	109	97	116	105	143
Forgery, and uttering forged instruments...	179	192	62	53	34	36	47
Forged bank notes, having in possession, &c.	280	184	1	.....	.....	.....	5
Fraudulent offences.....	267	330	267	237	239	302	279
Frame-breaking, and destroying machinery	2	1	.....	.....	.....	3	.....
Game Laws, offences against.....	177	199	132	223	178	151	183
Horse stealing.....	149	173	136	179	150	229	169
Housebreaking in the day-time, and larceny	222	210	142	170	176	150	168
Larceny, Simple.....	9,160	8,725	8,445	8,477	9,554	10,067	11,111
— in a dwelling-house, to the } value of 40s..... }	249	203	191	211	275	265	300
— in a shop, &c. privately, &c.....	44	17	.....	1	2	.....	.....
— on a navigable river, &c. to } the value of 40s..... }	1	3	.....	1	.....	.....	.....
— of naval stores to the value } of 20s..... }	4	.....	.....	.....	7	.....	.....
— from bleaching grounds, &c.....	4	.....	4	.....	.....	.....	1
— from the person.....	776	639	625	550	695	835	1,055
Letter, containing bank notes, &c. se- } creting and stealing..... }	.....	.....	.....	.....	1	2	1
— sending threatening.....	6	3	3	1	7	5	3
Manslaughter.....	62	101	92	116	109	122	141
Murder.....	49	71	85	60	73	94	57
— shooting at, stabbing, and admi- } nistering poison, with intent to..... }	45	60	74	63	71	57	47
— concealing the birth of their infants	10	7	9	11	6	8	8
Oath unlawful, taking and administering	1	.....	.....	.....	.....	.....	.....
Perjury.....	14	14	16	8	5	11	14
Piracy.....	.....	.....	.....	25	.....	2	.....
Rape, &c.....	37	39	49	48	46	43	29
— assault with intent to commit	52	52	68	77	69	65	117
Riot and felony.....	2	.....	.....	.....	.....	.....	62
Robbery on the person, on the highway, } and other places..... }	244	311	278	201	258	189	306
Sacrilege.....	10	6	11	8	6	2	4
Sheep stealing, and killing with intent to } steal..... }	207	169	103	130	155	166	190
Sodomy.....	15	12	13	18	13	9	4
— assault with intent to commit, } and other unnatural offences..... }	27	16	33	44	27	40	35
Stolen goods, receiving.....	212	304	256	299	388	289	405
Treason, high.....	42	1	.....	.....	.....	.....	.....
— Transports, being at large, &c.....	2	13	4	4	4	4	12
Felony, stealing part of a wreck.....	.....	.....	1	1	.....	.....	.....
— armed to assist smugglers, &c.....	.....	.....	.....	.....	.....	2	1
— rescuing felons.....	.....	4	.....	.....	.....	.....	.....
— cutting hopbinds, growing, &c.....	.....	.....	.....	1	.....	.....	.....
— cutting down trees, growing, &c.....	.....	2	4	4	.....	.....	.....
— trafficking in slaves.....	2	.....	.....	.....	.....	.....	1
Felony and Misdemeanor, (not otherwise } described)..... }	226	220	199	221	225	413	387
Total number of persons for trial in } each year..... }	13,710	13,115	12,241	12,263	13,696	14,437	16,147

SENTENCED TO DEATH.

Crimes for which persons received sentence of death, in the years.....	1820.	1821.	1822.	1823.	1824.	1825.	1826.	Total number in the seven years.
No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	
Arson, and other wilful burning } of property.....	1	5	17	6	6	7	3	45
Burglary.....	283	294	322	261	302	276	300	2,047
Cattle stealing.....	22	14	9	24	19	24	21	123
— maliciously killing and } maiming.....	1	1	.....	.....	2	.....	.....	4
Coining.....	.....	.....	2	1	2	1	7	13
Coin, uttering counterfeit (hav- } ing been convicted as common } utterers).....	1	.....	.....	1	2	2	1	7
Forgery, and uttering forged in- } struments.....	101	70	35	29	22	18	23	398
Horse stealing.....	111	129	102	134	104	165	190	865
Housebreaking in the day-time, } and larceny.....	158	167	102	124	123	112	125	916
Larceny, grand.....	.....	1	1	.....	1	.....	1	4
— in a dwelling house, } to the value of 40s.....	163	134	133	145	188	186	222	1,171
— in a shop, &c. pri- } vately, &c.....	33	5	.....	1	2	.....	.....	41
— on a navigable river, } &c. to the value of } 40s.....	1	1	.....	.....	.....	.....	.....	2
— of naval stores to the } value of 20s.....	3	.....	.....	.....	.....	.....	.....	3
Letter, containing bank notes, } &c. secreting and } stealing.....	.....	.....	.....	.....	1	2	.....	3
— sending threatening.....	2	1	1	.....	2	.....	.....	6
Murder.....	14	25	24	12	17	12	13	115
— shooting at, stabbing, } and administering poi- } son, with intent to.....	8	12	33	14	21	17	14	119
Piracy.....	.....	.....	.....	.....	.....	2	.....	2
Rape, &c.....	11	6	10	11	9	6	4	57
Riot and felony.....	.....	2	.....	.....	.....	.....	48	50
Robbery on the person, on the } highway, and other places.....	133	160	141	113	124	93	144	908
Sacrilege.....	9	5	8	4	4	1	4	35
Sheep stealing, and killing with } intent to steal.....	143	90	66	79	105	104	127	714
Sodomy.....	3	1	4	3	1	2	1	15
Treason, high.....	33	1	.....	.....	.....	.....	.....	34
Transports being at large, &c.....	2	8	4	4	3	4	12	37
Felony, stealing part of a wreck } — cutting down trees, grow- } ing, &c.....	.....	.....	1	1	.....	.....	.....	2
— rescuing felons.....	.....	4	.....	.....	.....	.....	.....	4
— assembling armed to as- } sist smugglers.....	.....	.....	.....	.....	1	2	1	4
Total number of persons who } received sentence of death.....	1,236	1,134	1,016	968	1,066	1,036	1,200	7,856

EXECUTED.

Crimes for which persons were executed, who received sentence of death, in the years	1820.	1821.	1822.	1823.	1824.	1825.	1826.	Total number in the seven years.
	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	No. of Persons.	
Arson, and other wilful burning of property	.....	.....	6	.....	1	1	1	9
Burglary	18	29	23	11	13	12	10	116
Coining	.....	.....	1	1	1	.....	1	4
Forgery, and uttering forged instruments	20	16	6	2	3	1	1	49
Horse stealing	2	3	1	4	1	8	7	26
Housebreaking in the day-time, and larceny	2	5	1	1	.....	.....	.....	9
Larceny in a dwelling house, to the value of 40s.	3	5	6	3	1	2	5	25
Letter, containing bank notes, secreting and stealing	.....	.....	.....	.....	.....	1	.....	1
Murder	10	22	18	11	15	10	10	96
— shooting at, stabbing, and administering poison with intent to	3	3	9	5	3	1	1	25
Rape, &c.	6	3	6	8	3	3	2	31
Riot, &c. (Remaining assembled with rioters for one hour after the proclamation under the riot act had been read)	.....	1	.....	.....	.....	.....	.....	1
Robbery on the person, on the highway, and other places	23	22	15	5	6	6	15	92
Sacrilege	2	.....	.....	.....	.....	.....	.....	2
Sheep stealing	11	5	1	.....	1	3	3	24
Sodomy	2	.....	4	3	1	2	1	13
Treason, high	5	.....	.....	.....	.....	.....	.....	5
Total number of persons executed	107	114	97	54	49	50	57	528

STATE OF CRIME IN SPAIN.

Statement of Offences which have formed the Subject of Judicial Proceedings in Spain, during the Year 1826.—(Extracted from the Madrid Gazette.)

Homicides	1233
Infanticides	13
Cases of poisoning.....	6
Anthropophagus, or man-eater, in Catalonia	1
Suicides	16
Duels	4
Dangerous wounds, by cutting and maiming, &c.....	1773
Rapes	52
Cases of public incontinence (<i>incontinencia publica</i>)	144
Slanders	369
Blasphemies	27
Incendiaries.....	56
Thefts	1620
Cases of coining	10
Forgeries	43
Breaches of trust	640
Prevarications.....	10
Excesses of various kinds	2782

Of the persons charged with the above offences, there were

Sentenced to death.....	167
——— to the pillory.....	55
——— to hard labour in the dock-yards and garrisons.....	4960
——— to serve in the army and navy.....	479
——— to be cashiered from office	46
——— to fine or reprimand	7038
Pardoned	194
Acquitted, or trials postponed	1552

REPORT ON CRIMINAL COMMITMENTS AND
CONVICTIONS.

Report of the Select Committee of the House of Commons.

The Select Committee appointed to inquire into the cause of the increase in the number of criminal commitments and convictions in England and Wales; and who were empowered to report their observations and opinion thereupon, together with the minutes of evidence taken before them to the house; have inquired into the matters to them referred, and agreed upon the following Report:

THE appointment of the Committee having taken place late in the Session, there has not been sufficient time either for complete inquiry or mature deliberation on the whole of the important subject referred to them. But the evidence given before them upon one branch of their inquiry, appears to them of such considerable value as to justify their making a separate report; calling the attention of the House to its bearing and effect.

The first object to which the attention of your Committee was turned, was to inquire into the increase of the number of commitments as compared with the increase of the population. The increase of population from 1801 to 1821, is as follows:—

England and Wales.

1801.....	8,872,986
1811.....	10,150,616
1821.....	11,977,663

The number of commitments for trial in England and Wales from 1806 to 1826:—

1806	4,346
1816	9,091
1826	16,147

Including the number of commitments on summary conviction before Magistrates, the increase would be still greater. But the returns in the Secretary of State's office on this subject are not yet so complete as to induce your Committee to bring them before the attention of the House.

The increase of crime from 1806 to 1816, may, perhaps, be in part accounted for by the change from war to peace. From 1816 to 1826, however, not only has there been no such change, but peculiar attention has been paid to the subject of crime both by official persons, by voluntary committees, and by individuals. The duties of the Secretary of State for the Home Department have been exercised with peculiar zeal and judgment; prisons have been improved, the defects of the law inquired into, and education among the poor promoted.

In proceeding to inquire into the causes of the increase in the number of criminal commitments, your Committee, for the convenience of reducing into order an investigation so extensive, began by dividing the subject into

three parts—1. The increase of crime in the agricultural districts—2. The increase of crime in the manufacturing districts—3. The increase of crime in the metropolis. It is to the first part alone that they have hitherto directed their inquiries; nor have they been able to form a definite judgment even on this portion of the subject. They proceed, however, to lay before the House their observations, together with the substance of the evidence taken before them, referring to the evidence itself for more complete details.

The main cause of the increase of crime in the agricultural districts appears clearly to be the low rate of wages, and want of sufficient employment for the labourer. This evil has been greatly aggravated, although not altogether produced by the abuse of the poor laws to a purpose for which they were never intended. During the high price of provisions, which occurred soon after the commencement of the war of 1793, the farmers, instead of raising the wages of labour in proportion to the increased value of subsistence, had recourse to the expedient of making up the deficiency out of the poor rate. While the war continued, the increasing demand for agricultural produce, and the abundance of the currency, concealed the evils with which this system was pregnant; but with the restoration of peace came large importations of foreign corn, a diminished currency, and a want of employment for the labourer. At the same time, while employment diminished, the new administration of the poor laws tended to increase the population. So that the farther this vicious system was carried, the greater and more difficult became the obstacles to a restoration of a healthy state. The fluctuations which have taken place since 1816, both with regard to the price of corn and the amount of the currency in circulation, have still further acted to prevent any improvement in the situation of the country.

It is not for your Committee to enter into any discussion on questions of economy. But they think it their duty to call the attention of the House to the degradation of the moral character of the labouring classes, which attends the vicious system of supporting from the poor rates a number of young men, for whom the parish finds only partial employment. The wretchedness of their condition, the want of regular habits, and of the due subordination of the labourer to his employer, all tend greatly to the promotion of crime. Early marriages, contracted either to avoid going to prison on a charge of bastardy, or with a view of receiving a better allowance from the parish, increase the evil, and multiply a population for whom there is no certain employment, and a miserable subsistence; and in this situation they are too apt to believe they can improve their condition by offending against the laws.

The best remedy for such a state of things would undoubtedly be a great increase in the demand for labour. But whether that increase takes place or not, some amendment of the poor laws which might prevent the prevailing abuses from being carried further, seems to be called for. At present, while in many counties the character of the labourer is daily becoming worse, and the means of his employer daily becoming less, there are other districts where the old and wholesome administration of the poor laws prevails, where the wages given are sufficient for the maintenance of the labourer, and the feeling of independence is not yet obliterated. It is surely desirable to prevent the infection of a vicious system from spreading to districts which it has not reached, and, if possible, to provide for its gradual diminution in those where it most prevails.

The evidence taken before the Committee shows undeniably that the great increase of preserves for game which has taken place of late years, has tended materially to the increase of crime in particular districts

pheasant or a hare is so easily taken, that a labourer, only half employed, and ill fed, cannot resist the temptation. Men of a wild character, likewise, have within their reach both the means of gratifying their love of sport, and the means of disposing of their booty. Some are of opinion, that if the sale of game were allowed by law, poaching would not be so frequently resorted to. Whether such a speculation be well founded or not, it appears to be the duty of the legislature to listen to every rational proposal on the subject of the Game Laws, and rather to hazard an experiment which may fail, than to allow the present evils to continue without any effort to counteract them.

When on this subject it deserves remark, that in the return of the commitments of prisoners for trial, none are to be found for offences against the Game Laws, till the passing of the act which subjects men to transportation for going armed at night in pursuit of game. This offence does not appear by the returns to have increased since the passing of the act; the number committed in 1827 being 127, and in 1828, 126. But many of the petty larcenies in the agricultural counties are to be attributed to the vicious habits created by poaching.

With regard to prison discipline, your Committee will make at present but two short remarks. The one is, that little good seems to be effected by confinement, unless accompanied by bodily labour. The other, that the construction and regulation of the tread-mill, the prison diet, and the hours to be employed in hard labour, ought to be made as nearly as possible uniform in every goal in the kingdom.

The Committee do not at present feel themselves prepared to give any opinion on the evidence upon the very important subject of education.

With respect to the increased frequency of commitments under the "Malicious Trespass Act," your Committee would observe, that although petty offences ought not to go altogether unpunished, there can be no greater evil than the abuse of the power of sending to prison for trifling trespasses; so far from preventing atrocious offences, your Committee is of opinion, that the mere fact of having been sent to prison is likely to deprive a man of one of the greatest moral restraints—the dread of being marked out as a criminal in the face of his country. To this evil is to be added the danger of associating with bad characters in prison, and the difficulty which sometimes occurs of finding employment after being discharged.

The Committee now proceed to furnish a summary of the evidence taken before them.

Mr. Pym has acted for nine years as a magistrate for the county of Cambridge. It appears from the returns presented to parliament, that the number of prisoners committed for trial in the county of Cambridge were, in 1808, 40; 1808, 26; 1814, 37; 1818, 64; 1816, 71; 1824, 110; 1828, 137; 1826, 142. Mr. Pym is of opinion, that since the "Gaul Act" there have been more full returns sent to the office of the Secretary of State. He states, however, that there are more committals under the game laws, which he attributes to distress. The sum given by the parish to a single man who has no employment is 2s. 8d. per week; the wages in harvest is 26s. a week, and beer. "In the summer season these single men can earn as much as would enable a man to support a family, generally speaking; they then squander that money, and in the winter, about the month of November, they generally apply to the overseer, or to the surveyor; and I have known many instances, in many parishes, and it repeatedly comes before me, that single men would not let themselves as servants to the farmers, because if they should do so they would be under their control in the summer months, and they would rather take parish pay and take their chance through the winter than control themselves during the summer

months, when they would get a tolerable demand for labour, and constant employment."

He thinks the feeling of shame at receiving parochial relief is quite obliterated; the practice of the labourers subsisting on very small sums received from the parish without active employment, makes them discontented and dissatisfied with their condition. They think they are not sufficiently paid for their labour, and often hold out a threat, that if they have not more they must do something which they would not like to do to obtain it.

In this situation, the labourers are often guilty of poaching or fowl stealing, but especially the former. They do not consider poaching to be a moral offence; there is a very general feeling both among the farmers and amongst the labourers, that poaching is not a moral crime. The labourers begin with poaching, and that leads to every thing that is bad; they begin to set snares at ten years old. In the district where Mr. Pym resides, however, there is very little game, and more fowl stealing. In the gaol at Cambridge, the prisoners work on the tread-mill nine hours a-day; those who work on the tread-mill have three pounds of bread and a pint of small beer a-day allowed them. Those who are not put upon the tread-mill are allowed only a pound and a half of bread a day, and nothing else. Poachers, who are not put on the tread-mill, often apply to be employed on it for the increased allowance: idle men, on the other hand, have a greater dread of being sent to gaol than they formerly had.

The Rev. Dr. Hunt produced, from an accurate return, the total number of commitments to the gaol of Bedford. In 1802, they were 47; 1803, 88; 1805, 91; 1806, 120; 1815, 125; 1816, 141; 1825, 333; 1826, 348, and the year ending the 10th of January 1827, 417. He calculates that, from the year ending 1801 to 1827, the population of the country has increased to the amount of 40 per cent.; while, during the same period, crime has increased ten-fold, or 900 per cent. It is to be remarked, however, that in the year following 1801, criminal commitments more than doubled, and have never since been much below that amount. It is likewise to be observed, that the prisoners from the town are now committed to the county gaol. On the other hand, the practice of sending vagrants to gaol, which, of course, swelled the returns, has been discontinued for the last few years.

Dr. Hunt states, as the first cause of the increase of crime, the distress of the agricultural labourer. He says, that in some parishes the unmarried labourers are universally degraded to become roundsmen, or parish labourers on the gravel pits or on the roads; that such men receive from 3s. to 3s. 6d. a week; that he has known an instance of a young man apparently 17 years of age, who received only 2s. a week. That they marry either to avoid going to prison on a charge of bastardy, or to obtain a better provision from the parish. That he has observed a great loss of the feeling of independence, scarcely any compunction at receiving parish relief, and a consequent degradation in the moral character of the labourer. He does not think any great improvement can take place among them till they can generally obtain regular employment and fair wages. Those who are kept by the parish during the winter receive 5s. from the overseer, to enable them to seek their fortunes during hay time and harvest. Those who get employed for harvest work receive about a pound a week. Irish labourers supply their place at harvest, and the labourers of the parish return to be a burden during the winter.

Men in this wretched condition are liable to yield to any temptation; they go to poaching as an offence of the smallest guilt. They generally appear hardly to consider poaching as a crime; many who are guilty of

poaching would certainly have great reluctance to commit what they would consider a violation of private property. The great majority of persons committed for offences against the game laws are young unmarried labourers, though some poachers are dissolute characters, who would remain such even if good wages were offered. The general opinion is, that game is not private property. They say, God has made the game of the land free, and left it free. The farmers, injured by the game, do not discourage this notion. When punished for offences against the game laws, they are apt to think they have not had a fair trial, when they have been convicted by strict preservers of game, who have frequently been sufferers. Poaching and commitment to prison bring them acquainted with dissolute characters; they proceed to petty thefts; and thus poaching tends in various ways to injure the moral feelings of the labourer.

Dr. Hunt is of opinion that the Malicious Trespass Act, and other acts which give summary jurisdiction, have greatly increased the number of commitments. He is also of opinion, that these commitments tend to the increase of crime; because a person once sent to prison gets into a course of criminal habits, by associating with dissolute persons he meets there. With regard to prison discipline, he adds, "After long and attentive observation on prison discipline, and after a great deal of conversation with the very excellent chaplain of the prisons of the county of Bedford, I fear that very little improvement is ever made in the moral habits of a prisoner by even the best forms of prison discipline and instruction that have yet been devised." The classification is as perfect in the Bedford gaol as it can be made in a county of that extent. He afterwards states his opinion in these words:—"I do not think that prison discipline has increased crime, but that sending to prison at all for a small crime rather tends to increase crime of every description; a man becomes a worse subject by being sent to prison; but he is not made so much worse now as formerly, in consequence of the improved discipline of prisons." He allows that the discipline of prisons is better than it ever was formerly, but thinks that punishment of this or any other kind has not a fair trial, because the prisoners have not been able to return to a state of regular employment at good wages.

With regard to education, Dr. Hunt states, that domestic discipline and parental control have not been so much attended to as formerly, arising perhaps from the great increase of schools, parents expecting from those schools more than they have been found to realize. The rapid education given in them is seldom accompanied with much moral instruction. Sometimes when he has reproached the parent of a child, who had shown early depravity, the parent has thrown the fault upon the school, saying, "I sent the child to a school where it ought to have been instructed better; I have nothing to reproach myself with." He has always observed, that educated prisoners have been better behaved in proportion to the education they have received, particularly if moral discipline and instruction have accompanied it; but no very permanent good results, unless parental control had also been exercised. He is of opinion that a very great improvement in the moral character of the poor might be effected by a more general diffusion of the system of infant schools.

Mr. Orridge, who has been governor of the gaol and house of correction at Bury St. Edmunds for very near thirty years, has given very valuable information to the Committee. The number of prisoners committed to the House of Correction has been:—

1805.....291	1815.....387	1824.....457
1806.....192	1816.....476	1825.....539
1807.....173	1817.....430	1826.....573

This witness states, that the great increase in the number of commitments began in the year 1814, from the depression of agriculture and the great dearth of employment. Men are employed upon the roads at a very low rate. They consider it a matter of right to be paid from the poor's rate. When the unemployed poor are put by the parish to work on the roads they become lazy; they know that whether they sit on the wheelbarrow all the day, or work hard, the result on Saturday night will be the same. The continuance of this practice has a bad moral effect. He remembers the time when a man considered himself disgraced by taking the allowance, but that feeling is now gone by, and the independent spirit has been all destroyed. Single men receive from 8d. to 10d. a day from the parish. Next to the want of employment, and the inadequacy of the price of labour, he attributes the increase of crime to the fact, that there is an abundant market for game, and nobody to compete in that market with the poacher. The quantity of game is greatly increased. When first he went to the gaol there were four packs of fox-hounds kept in the district; there are none now. Since the fox-hounds have been laid down, gentlemen have turned their attention to the preservation of game; and associations for this purpose pay for the services of those who give information that leads to a conviction. Until game became strictly preserved, and game associations formed, the number of commitments under the Game Laws was inconsiderable—1810, 5; 1811, 4; 1812, 2; 1824, 60; 1825, 41; 1826, 71; 1827, (a year of great agricultural distress) 78. Some poachers commit offences of this kind from the love of sport; but the greater part of them are single men who do not receive adequate wages. He believes, that if game could be legally bought, the major part of the purchasers would not deal with the illegal traders in it; how far that would drive them into the farmer's pig and poultry yards he will not pretend to determine. While the first cause exists there will be misdemeanours of some character or other. He observes, however, that in the article of poaching, there is a general understanding amongst the lower orders of the people that there is no moral crime in it; so that they go to it with a feeling that they are doing no moral wrong. "I believe there are many men go to poaching who would not steal; but I am afraid there are many men who, when they have been out and taken no game, would take poultry on their return, from their necessities. I have known instances where men have assured me, after conviction, that they went out for the purpose of taking game, but having been disappointed, they have, on their return, taken fowls, or pigs, or something else. I think that it leads to a great deal of crime, and so far affects the morals of the people. I think there are poachers who would shudder at what they considered a felony; but from congregating with idle characters, when they carry the game for sale, their minds get corrupted, and their moral feelings blunted."

This witness attributes a part of the increase in the number of commitments to the Trespass Act, which gives a power to magistrates to commit and convict. He is likewise of opinion, that the improved discipline of gaols induces many magistrates to commit, where formerly they would not have done it. There used to be a reprimand from the magistrate, and a power of flogging them at the stocks for minor offences. He thinks that the Trespass Act has done great good, and has tended to diminish the number of atrocious crimes. The county of Suffolk, when he first knew it, had more crimes of atrocious character than it has at present. Formerly the gaol had but two rooms, one for debtors, and one for criminals of all denominations. The doors were opened in the morning and not shut till night; there was a constant intercourse with those abroad; there was no prohibition of liquor; there was a tap in the prison: the whole was a scene of riot. Now, all is order; the prisoners are kept on

the tread-mill, and there is more dread of coming to gaol. The tread-mill, when administered mildly, is no effectual punishment ; industry, regularity, and order, are inculcated by it, when properly applied. The men work between nine and ten hours a day, two-thirds on, and one-third off: he calculates they walk from forty-eight to fifty steps in a minute, each step seven inches apart. As regards juvenile offenders, a less term of imprisonment than that usually applied, with private whippings, is more effectual than longer terms. The sense of shame is not gone off with the short imprisonment, and, combined with the pain of feeling, makes a lasting impression ; but if they are kept for a long time, communicating, as they must do, however the gaol is managed, that tends to lessen the sense of shame, and perhaps to harden them. With respect to poaching, he observes, that the commitment for poaching is a commitment for non-payment of money, and does not enforce hard labour. " We may employ them, but then the Act says in something not severe. Unless we can employ them so as to fatigue the body, the other is an amusement, and wears away the term of imprisonment ; and, in respect to moral instruction, where you do not fatigue the body by labour, you do not affect the man's mind ; and I think there is a defect in the Game Laws: if it is necessary to commit at all, it is necessary to attach hard labour to it. I think it would be extremely wholesome if the power of hard labour was given with respect to almost all convictions." As to any labour less severe than the tread-mill, he thinks it would be a sort of amusement, and would be rather desired by the prisoners than otherwise, to pass time away. Whenever in prison any sort of labour is introduced that requires art, they must be watched, or they will spoil it. " Prisoners can be employed in scarcely any thing but as mere machines ; when they are to furnish any article of value, if they are put out of humour they will spoil it. I think in that case, their inclinations must be consulted, rather than forced by discipline, which is wrong." As to solitary confinement, it operates on different individuals very differently. A sluggard would sleep the greater part of the time, whereas it would drive an active person nearly to madness. As to moral improvement, Mr. Orridge seems in some doubt. He observes that hypocrisy goes to a great extent in prison ; that there are many whom he has never known properly till he had no power over them ; that a complete scoundrel conceals himself. " I had thought that after thirty years I had a knowledge of criminal character, but I believe I shall die a novice at last." With respect to classification, judging from thirty years' experience, he classes them by character and conduct, and not by crime ; always informing the magistrate if he deviates much from the rule laid down in the Act of Parliament. He thinks the classification according to law does no good at all ; a man of the most atrocious character may be sent to prison for a very slight offence. With respect to education, he has great doubt of the efficiency of the system of education as now conducted ; he would give the preference to instruction rather than no instruction ; but he thinks there wants to be a system of industry promoted with the instruction. He thinks the Sunday Schools are very excellent things ; the children are never employed on that day, and as they will congregate, they had better congregate in Sunday Schools. But where there is only a system of education without sowing the seeds of industry, it does not go far enough. The boys are at school all day, and do not learn habits of industry from their parents as they used to do. They afterwards, however, frequently forget what they have learnt. He remembers a charity school in the town where he resides, in which the woollen business was conducted ; they went to labour by spinning, and on the alternate days they went to reading ; there

were very few commitments of persons educated in that school. He thinks, however, upon the whole, that if education had not been introduced, the increase of crime would have been greater than it now is.

Sir Thomas Baring, a member of the Committee, having acted as a magistrate for about twenty years, in the county of Hants, states, that offences of an atrocious character have diminished, excepting horse and sheep-stealing; but petty offences increased to a very great degree. There have been frequently as many as fifty, sixty, and seventy prisoners in the House of Correction for offences against the Game Laws, exclusive of offences against the Game Laws of greater magnitude. The Committee call the attention of the House to the following parts of the examination of Sir Thomas Baring:—

Do you remember at what time the great increase of offences with regard to game began?—I think for the last three or four years there has been a great increase.

Do you attribute that to the increase of distress, or the increase of game affording greater opportunity?—To both.

Have the people been generally in a worse condition during the last three or four years than they were before?—I think they certainly have; and whenever the price of agricultural produce is low, distress prevails amongst the agricultural labourers.

During times of distress, is poaching the most common offence?—I think it is almost the only offence to which distress drives the agricultural labouring population, except poultry stealing and wood stealing, which have prevailed to a great degree also.

Do you think that if there were no game, distress would have caused poultry stealing, and other offences of the like kind to an equal amount?—I should think not, from the facility with which that offence may be committed, as compared with other petty offences.

Has there been a great increase in the quantity of game preserved?—Very considerable, and confined to small woods, making it extremely easy for them to be taken.

To what species of game do you refer?—Game in the woods—hares and pheasants; but I can mention an instance where game is preserved to the highest degree almost of any property in that part of the country; and in consequence of some illiberal observations in one of the newspapers, that the proprietor had occasioned a number of persons to be committed for poaching, I had the curiosity to inquire what number of persons had been committed for poaching upon that property since the game was first preserved, for the last thirteen years, and in that period only three persons had been committed for poaching on that property.

To what do you attribute that?—In consequence of the strict watch, and the number of persons employed to preserve the game.

Do you believe that, if the labourers were paid adequate wages, there would be much poaching?—I feel confident that there would not, and I can speak from personal experience. In the part of the country in which I reside, poaching existed to a considerable extent; from attention to the employment of the poor, and to their conduct also, I can say, for the last two years no one instance of poaching has occurred committed by persons of that neighbourhood. It had been the custom of farmers in the winter months to reduce the price of labour from 9s. and 10s. to 7s. and 8s.; I prevailed upon them last year not to reduce the labour at all, but to keep it at 9s., and I endeavoured to show them, and did succeed in persuading them, that they would not lose by the system; that they would have nearly as much to pay in parish rates, and the result has been that the people were

well off: and in no instance has there been a complaint made to me, as a magistrate, from any party in the neighbourhood, for any criminal offence committed; a circumstance which has not occurred in any former year.

Were all the labourers employed during the winter?—The whole of them were employed; whenever a person was found wanting employment, by agreement amongst the farmers he is taken into the employment of some one of them, and not allowed to remain unemployed.

Do you not think that the present manner of administering the poor laws leads to an increase of the population beyond the means of employment?—I think the poor laws have been very much abused. If restricted to their original intention and purpose, they would be productive of the greatest benefit to the country; abused, they are productive of great evil. If they were confined simply to provide for the aged and infirm, and impotent, and not applied, as they are now, to the payment of part of the wages to the labourers, they would be productive of good. There is also mixed up in what is termed poor rates that which does not belong to them, and which ought to be separated; and I think, if persons of intelligence would look more accurately into the management of the poor, and to their comforts and conduct, the system of the poor laws would be a national benefit, and not an injury, both to the poor and to the rich.

What do you think is the objection felt to making that change on the part of the farmers generally?—I think, in the first instance, the desire to throw the burthen from themselves upon others, and also, in a great measure, from an indifference which prevails in their minds with respect to the moral character and conduct of the poor; that when they have to pay 9s. wages instead of 7s. they do not take into consideration that in the event of their paying 7s. they will very frequently have nearly as much to pay in the shape of their proportion to the poor's rate.

Should the Committee be renewed next year, some valuable information may be expected from Sir T. Baring, on the subject of prison discipline.

The Committee refer the House to his evidence for the plan of a village shop which he has adopted, with great benefit to the labourer.

Sir James Graham, Baronet, has acted for the last eight years as a magistrate for the county of Cumberland: until within the last eighteen months he has not observed any increase of crime; but since the commencement of distress among the hand-loom weavers in Carlisle and its vicinity, crime has increased in that particular district. In the county of Cumberland it is universally the custom to refuse any payment of wages out of the poor rates; the consequence is, that the rate of wages is higher in Cumberland than almost any other agricultural county. A ploughman there receives at least 12s. a week; in many cases the cottagers have rooms rent-free, and in no case does a field labourer receive less than 18d. a day, if he be a good workman. Mr. Sturges Bourne's Act has been carried almost universally into execution; select vestries assemble regularly according to the provisions of that Act; neither rent nor wages are paid out of the poor rates; except in special cases, relief is refused; and the poor rates, notwithstanding the increase of manufacturing poverty, have diminished even in the manufacturing districts, since 1819. "In the parishes with which I am more particularly connected, as being the principal proprietor within them, upon the first passing of Mr. Sturges Bourne's Act, I availed myself, with the concurrence of the vestry, of a provision contained in it for raising money for the purpose of enlarging the poor-house. At that time the parishes to which I allude were in the habit of paying rents out of the poor rates; they became convinced that this was an unwise and prodigal expenditure, and though the outlay in enlarging the workhouse was considerable, amounting to somewhat more than 400*l.*, at least half of

one year's rate, yet when the workhouse was finished, they were enabled at once to refuse relief to all persons unwilling to go there, and the number of applicants diminished so much, that in the course of two years the parish was re-imbursed for the whole outlay; and, at the present moment, as I mentioned before, no rents are paid out of the poor rates, and no persons are relieved except under very special circumstances, at their own houses."

The habits of the agricultural labourers are moral, industrious, and economical. There still exists a great spirit of independence, and the utmost want and distress are often endured with patience, in preference to an application to the vestry. In Cumberland, however, both the farmers and agricultural labourers are content with very mean and scanty food; the sustenance of the labourer consists almost entirely of milk, potatoes, and oatmeal; he very rarely eats meat. The situation of the farmer is very little better or more luxurious. Upon the whole, neither the farmer nor the agricultural labourer is in a worse condition than he was thirty years ago. Sir James Graham is of opinion "that the power given by Mr. Sturges Bourne's Act, of enlarging workhouses, and of making them capable of containing all persons to whom the parish is bound to give relief, and a steady adherence to the principle of never giving it out of the workhouses, coupled with such regulations of the workhouse itself as are now consistent with the law of the land (the utility of which is exemplified in the management of the workhouse at Liverpool), would supply the means of checking the natural improvidence of the labourer, and his disposition to early marriage; he would fear to make himself dependent on parish relief; he would look at the workhouse with dread, not, as at present, almost with indifference; and by the increased exertions of the labouring classes themselves, by greater prudence on their part, formed by a wiser administration of the existing law, I am disposed to think that the poor-rates might be reduced throughout England; at all events, that their rapid inroads might be arrested." The select vestries exercise the power vested in them with sound discretion; character is almost invariably an ingredient in their decisions. The most fertile source of crime is the preservation of game; the lower orders, in common with the highest, have a natural love of the sport, even stimulated, perhaps, by the risks attendant on its gratification; the tameness of the pheasants, which were formerly almost unknown in this neighbourhood, and which are now seen constantly in the fields close to the road, is a great temptation to the lower orders to take them. "Persons going armed at night on a marauding excursion seldom confine their depredations to the taking of game; and many cases of petty thefts, such as robbing of hen-roosts and out-houses, have been brought before me, which I have been able clearly to trace to persons going out at night with the intention of poaching. On the whole, I should think poaching the cause, rather than the consequence, of criminal habits." When an unemployed labourer applies to the parish for relief, he is usually sent to break stones upon the turnpike-road, which work is paid by the square yard of stone broken; he is fed and clothed at the expence of the parish; his earnings are carried to the account of the parish; if he does not break the average quantity of stones, the keeper of the workhouse brings the pauper before a magistrate, who has it in his power to send him to the house of correction.

In a gaol and house of correction at Carlisle, the tread-mill has been at work about eighteen months. Sir James Graham cannot perceive that the work appears very irksome to the prisoners. The severity of the tread-mill at Carlisle is about the average severity; the severity of this punishment very much depends upon the height of the steps, and the frequency of the rotation of the wheel. These vary in almost every gaol. "I have always been of opinion that, by legislative interposition, the degree of labour ought

to be regulated and made the same in every gaol and house of correction throughout England; because it does appear to me absurd, that, where the crime is the same, and the punishment is intended also to be the same, from the accidental circumstance of the hard labour in one gaol being more severe than in another, the punishment ordained as uniform should vary to any degree."

Is the allowance increased for the prisoners who are put upon the tread-mill?—The only difference is, that they are allowed beer, which is denied to other prisoners; and as I have mentioned the disparity of punishment arising from the circumstance of the tread-mill in one gaol being more severe than in another, I perhaps may be allowed to express an opinion, that a difference in the diet, which in one gaol is much more spare than in another, partakes of the same inconvenience I have alluded to with respect to the difference of hard labour, not contemplated by the law.

Have you made any observation generally on the effect of prison discipline in the gaol of Carlisle?—I have; and the result of that observation, coupled with inquiries from persons who have had great experience, such as Mr. Orridge, the gaoler at Bury, and his son, who is the gaoler at Carlisle, led me to think that in very few cases is a gaol ever a place of reform; we have reason to know that the best conducted prisoners are those who are anxious to obtain a mitigation of their sentence by their good conduct within the walls of the prison; and in many cases a portion of their sentence has been remitted in consequence of such good conduct, and within a very short period those very individuals have committed fresh crimes of a deeper die.

So that you are of opinion that, generally speaking, the good conduct of prisoners is not to be attributed to any real reformation in their character?—Most decidedly.

With respect to the reformation of offenders in prison, you stated that your views on that subject were much less sanguine than they had been; do you attribute their non-reformation to their early character, or to their always associating in prison with criminals?—I must ascribe the cause of their not being reformed to the deep taint of their character before they are sent to prison; because in the gaol of Carlisle, classification is carried even further than the late Prison Act directs; the prisoners are rarely left alone; they are constantly under the eye of the governor and the watchmen, who attend them when on the tread-mill; there they are not allowed even to speak to each other; a large portion of the twenty-four hours is spent by each prisoner alone in his own cell, and the contamination arising from intercourse is almost entirely prevented; consequently, I can only arrive at the conclusion, that the non-reformation of prisoners is owing to a taint of their character before they are sent to prison.

Do you think that prison discipline can ever effect much more than has been effected in the best regulated prisons in this country?—I think it impossible to carry wholesome discipline further than it is now carried in the best regulated gaols in England, with the exception, however, of the two suggestions I have made, relative to equalizing the punishment of the tread-mill, and assimilating the diet in every gaol throughout England.

Your Committee earnestly hope that the House will, early in the ensuing Session, direct the inquiries on this subject to be resumed.

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